

PHILIP J. WEISER
Attorney General

NATALIE HANLON LEH
Chief Deputy Attorney General

ERIC R. OLSON
Solicitor General

JUNE TAYLOR
Chief Operating Officer



RALPH L. CARR
COLORADO JUDICIAL CENTER
1300 Broadway, 10th Floor
Denver, Colorado 80203
Phone (720) 508-6000

STATE OF COLORADO
DEPARTMENT OF LAW

March 28, 2019

The Honorable Chris Kennedy
Chair, Committee on State, Veterans, and Military Affairs
House of Representatives
Colorado General Assembly
State Capitol
Denver, Colorado 80203

RE: Senate Bill 19-078 (“Concerning the Protection of the Open Internet”)

Dear Representative Kennedy:

As the House Committee on State, Veterans, and Military Affairs today receives public testimony on Senate Bill 19-078, “Concerning the Protection of the Open Internet”¹ (“SB 19-078”), I would like to offer the following thoughts and considerations as you weigh this important legislation, and to convey my strong support.

History of Net Neutrality

In 2004, then-Federal Communications Commission (“FCC”) Chairman Michael Powell endorsed the concept of Internet Freedom at the University of Colorado’s Silicon Flatirons Center.² The Center, which I founded and ran until entering my current role as attorney general, hosted a conference the year before which developed the concept of what is now called “net neutrality.” The term “net neutrality” was first used at that 2003 conference. After embracing the concept, FCC Chairman Powell oversaw the first enforcement action defending a free and open Internet in 2005, sanctioning the Madison River Communications telephone company for blocking a Voice over Internet service that relied on that telephone company’s broadband connections.

The definition of net neutrality has evolved in the past 16 years. At its essence, the concept remains that an application provider should be able to rely on non-discriminatory access to broadband connections. This commitment protects upstart entrepreneurs as well as consumers. Among other things, this principle bans the blocking of services (as in the

¹ S.B. 19-078, 72nd Gen. Assemb., 1st Reg. Sess. (Colo. 2019).

² See Michael K. Powell, *Preserving Internet Freedom: Guiding Principles for the Industry*, 3 J. Telecomm. & High Tech. L. 5 (2004) (adapted from a speech and question and answer session delivered by FCC Chairman Michael K. Powell at Symposium on “The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age” held at the University of Colorado School of Law Silicon Flatirons Telecommunications Program on February 8, 2004).

Madison River case), the slowing (or throttling) of services, and the prioritization of one service at the unfair expense of others.

Since 2010, the FCC has on three different occasions set out its approach to net neutrality (or, as the agency calls it, Open Internet principles). The first two were relatively similar, but the basis for the agency's action was different: while the first decision relied on the agency's catch-all Title I authority (in 2010), the second decision relied on its Title II authority (in 2015), which governs traditional telecommunications networks. The third action in 2018 decided, at odds with each of the FCC's actions since Chairman Powell's 2004 speech, to end all net neutrality regulation except for disclosure requirements on broadband internet providers, opting to rely solely on the Federal Trade Commission and state attorneys general to protect consumers.

The FCC's 2018 decision to end net neutrality protections is now subject to a court challenge. The challenge to this decision is that the FCC is not permitted under the Administrative Procedure Act to make decisions in an arbitrary and capricious manner; stated differently, the agency must have a "reasoned explanation" for its decision.³ Indeed, it is hard to understand the reasoning behind the FCC's latest decision to end an era—running 15 years—during which the agency, under both Republican and Democratic leadership, barred the discrimination of internet traffic as contrary to the goals of the Communications Act.

To be clear, the debate over whether the appropriate basis for non-discrimination rules should be grounded in the agency's Title I or Title II authority was not at issue in the FCC's 2018 decision. Notably, that decision did not simply opt to shift back to a reliance on Title I authority, as some industry actors had requested. Rather, in a far-reaching and puzzling decision, the agency terminated a series of important substantive protections that consumers and innovators had come to rely on, replacing them with mere disclosure requirements.

The Role of Congress

It would be much better if Congress provided leadership on this important policy issue. The FCC, after all, is guided by Congress.⁴ Congress is not constrained by the debate around Title I or Title II authority, for example, because it is Congress that authorizes the FCC's ability to act. Therefore, if Congress passed a new provision of the Communications Act that codified the basic requirements of net neutrality, we would not be looking at a potential fourth round of FCC actions on this issue. But that is not how Congress has approached the issue. Last year, the U.S. Senate mustered the support necessary for a resolution of disapproval of the FCC's abandonment of net neutrality, but

³ See Proof Brief for Government Petitioners, Mozilla Corp. et al. v. Federal Communications Commission, No. 18-1051(L) (D.C. Cir. 2018).

⁴ For an additional perspective on what effective regulation and regulatory approaches in this area might look like, see Philip J. Weiser, *The Future of Internet Regulation*, 43 U.C. Davis L. Rev. 529 (2009).

the U.S. House of Representatives failed to act on the resolution.⁵ And as of this writing, neither branch of Congress appears ready to develop or advance substantive net neutrality legislation that can win bipartisan support. Unfortunately, the presence of members on both sides of the aisle committed to responsible action is not sufficient to prod Congress to begin considering legislation.

Congress's inability to act on net neutrality—or provide much leadership on communications policy—is an unfortunate departure from an earlier era when Congress was a leading actor in shaping policy. Consider, for example, that between 1978 and 1996, Congress passed several major pieces of legislation that addressed spectrum policy, cable policy, and pro-competition measures, including the comprehensive Telecommunications Act of 1996. Since 1996, however, Congress has passed almost no significant pieces of legislation on telecommunications matters (outside of calling for spectrum auctions to raise revenue) despite extraordinary changes in technology in the ensuing decades.

To provide stability and certainty in this area, it would be heartening to see bipartisan collaboration on telecommunications matters, including on a set of net neutrality protections that could be embodied in a stand-alone piece of legislation. In the 1980s, such collaboration existed, led by U.S. Representative Tim Wirth (CO), who chaired the House of Representatives Energy and Commerce Subcommittee on Telecommunications. If this spirit of collaborative problem-solving in this area started to take root in Congress, I would be the first to offer support and assistance on that front.

The Role of State Policy and State Consumer Protection Law

Until we see a functional approach to telecommunications policymaking from Congress, or the FCC's misguided decision is reversed in the courts, States are going to be left asking what they can do to protect the openness of the internet. Fortunately, as Senate Bill 19-078 ("SB 19-078") demonstrates, there are avenues open to states. First, states can condition universal service fund dollars provided by the state to require that any recipient commits to follow the Open Internet terms provided by the FCC's 2015 Order. Second, states can provide preference (insofar as they are purchasers of broadband internet services) to those broadband companies who commit to follow Open Internet principles. Finally, states can exercise their consumer protection authority to protect consumers.

In its 2018 Order, the FCC preempted states from imposing substantive net neutrality requirements.⁶ Some states, including California, have nonetheless attempted to

⁵Alyssa Newcomb, "Senate votes to save net neutrality — but House vote looms," NBC News (May 16, 2018), available at <https://www.nbcnews.com/tech/tech-news/senate-votes-save-net-neutrality-house-vote-looks-n874786>.

⁶FCC, In the Matter of Restoring Internet Freedom, 33 FCC Rcd. 311, at ¶ 195 (WC Docket No. 17-108) (2018) (adopted Nov. 22, 2017, released Jan. 4, 2018) [hereinafter FCC, *Internet Freedom Order*] ("We therefore preempt any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order. Among other things, we thereby preempt any so-called "economic" or "public utility-type" regulations, including common-carriage requirements akin to those found in Title II of the Act and its implementing rules, as well as other rules or requirements that we repeal or refrain from imposing today because they could pose an obstacle to or place an undue burden on the provision of

re-impose net neutrality rules on a state level. In response, parties—including the U.S. Department of Justice in the California case—have challenged such laws as pre-empted by the FCC’s Order.⁷

By contrast, the FCC left in place—and indeed specifically called out as helpful—the role of states to enforce their consumer protection laws and ensure that consumers were not misled by broadband providers.⁸ Senate Bill 9-078 fits within these guidelines and thus is compatible with the 2018 FCC Order.

Senate Bill 19-078

The Attorney General’s Office believes that SB 19-078 is an example of how states can, and should, provide consumer protections in the field of net neutrality. The legislation would bar an internet service provider from receiving grants from the Colorado High Cost Support Mechanism (“HCSM”) if that provider engaged in blocking lawful internet content, prioritized certain content for pay, regulated network traffic through bandwidth modification, or failed to be transparent about network management practices. If a provider engages in any of these acts, the law would require that any HCSM funds received by that company be returned. The bill also directs the Department of Law to coordinate with the Broadband Deployment Board to develop consumer guidance on filing complaints with the FTC if an allegation exists that these restricted activities occurred.

Senate Bill 19-078 is a well-crafted measure to exert more consumer protections for Coloradans. As the internet continues to be a more important and indispensable tool in our daily lives, SB 19-078 is one step that the State can take protect an open internet. I am grateful to Representatives Hansen and Herod, and Senators Bridges and Donovan for their leadership in bringing this important bill forward.

Conclusion

The situation we find ourselves in with net neutrality is an apt portrait of the state of our nation’s policymaking more generally. In many areas of public policy, federal agencies increasingly take major and radical policy shifts, adopting positions far beyond what even the regulated companies would seek, and then facing challenges in court under

broadband Internet access service and conflict with the deregulatory approach we adopt today.”).

⁷ See Complaint for Declaratory and Injunctive Relief, *United States v. California*, No. 2:18-at-01539 (E.D. Cal. 2018).

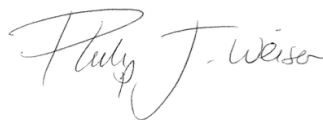
⁸FCC, *Internet Freedom Order*, at ¶ 198 (“Although we preempt state and local laws that interfere with the federal deregulatory policy restored in this order, we do not disturb or displace the states’ traditional role in generally policing such matters as fraud, taxation, and general commercial dealings, so long as the administration of such general state laws does not interfere with federal regulatory objectives. Indeed, the continued applicability of these general state laws is one of the considerations that persuade us that ISP conduct regulation is unnecessary here . . . We appreciate the many important functions served by our state and local partners, and we fully expect that the states will “continue to play their vital role in protecting consumers from fraud, enforcing fair business practices, for example, in advertising and billing, and generally responding to consumer inquiries and complaints” within the framework of this order.”).

the Administrative Procedure Act. At the same time, Congress has failed to provide guidance on important matters like net neutrality.

Until Congress is able to function appropriately, we can take some encouragement from the fact that the States, including their executive and legislative branches, are demonstrating the capacity to advance effective policy solutions. They are working hard on substantive issues, listening to different points of view, crafting thoughtful solutions, and developing approaches that are legally sound and can be enforced effectively. Senate Bill 19-078 is one important example of leadership by the States. By crafting such approaches in Colorado, we can both protect our citizens and provide a model for how our federal government should operate—and hopefully will once again. Until then, I look forward to working on state level public policy to make our government work for people and address important issues—like net neutrality—that protect consumers and enable innovation.

Thank you for the opportunity to convey my thoughts on SB 19-078 and net neutrality. As always, I appreciate your leadership and look forward to working with you.

Sincerely,

A handwritten signature in cursive script that reads "Phil J. Weiser".

Phil Weiser
Attorney General

cc: Committee on State, Veterans, Military Affairs members, Colorado House of Representatives
Representative Chris Hansen, Colorado House of Representatives
Representative Leslie Herod, Colorado House of Representatives
Senator Kerry Donovan, Colorado Senate
Senator Jeff Bridges, Colorado Senate
Speaker KC Becker, Colorado House of Representatives
President Leroy Garcia, Colorado Senate
Mr. Kurtis Morrison, Deputy Attorney General for Intergovt. Affairs, Department of Law