FRONTIER COMMUNICATIONS TESTIMONY ON HOUSE RESOLUTION No. 17

Thank you Chairman Jacobsen and the members of Communications and Technology Committee for the opportunity to talk with you in regards to House Resolution No. 17.

We have not yet had an opportunity to review the full text of the FCC decision, however we do not believe the FCC adopted the correct regulatory policy approach by reclassifying broadband internet access service as a Title II service. We have consistently stated that the FCC should not overlay on the Internet a regulatory framework developed for a monopoly telephone world from the 1930s. This is particularly true when all of the ISPs, such as Frontier, already embrace the core issues of concern to the FCC such as transparency, full disclosure, no fast lanes, non-discrimination obligations and no-blocking of lawful content.

We have included with our testimony today a document from the FCC that seems to indicate it maybe sometime before we see the "final" order. To quote, "The goal, of course, is to release the final order as possible. But speed is not the only – or even the upmost – goal."

Frontier encourages the Committee to review and comment on the FCC Order once it is released.

Frontier supports House Resolution No. 17.

Thank you for the time to talk with you today.

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Official FCC Blog

The Process of Governance: The FCC & the Open Internet Order

by: Jon Sallet, General Counsel

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The Commission's recent adoption of new Open Internet rules has received unprecedented attention and, along with national debate about the outcomes, has generated significant interest in the process by which the FCC, like other independent regulatory agencies, creates rules. In particular, people want to know when the new rules will be released for public review. The answer is tied to a broader question of governance: How does the FCC best create an enforceable rule that reflects public input, permits internal deliberation, and is built to withstand judicial review? As with its substantive decisions, the answer is simple – by following Congress' blueprints. As with governance generally, the goal is obvious: To engage in effective, informed action that furthers the public interest.

That's "blueprints" in the plural. The two pillars of Congressional will are expressed in the Communications Act, the touchstone of our substantive authority, and the Administrative Procedure Act (APA), the foundation of federal administrative action.

Among the Communications Act's important provisions are two of particular importance to the Open Internet Order: Title II, which governs "telecommunications service," and Section 706, by which Congress empowered the FCC to promote broadband deployment and to remove barriers to broadband network investment while promoting competition.

But how should these statutory commands be translated into policy? The APA tells us to make rules through a process of notice-and-comment rulemaking. Why? Because as long recognized, the expertise of the FCC, like any independent agency, grows greater when it hears "the frequently clashing viewpoints of those whom its regulation will affect, " in the words of a 1941 report on the Administrative Procedure Act by the Justice Department (Attorney General's Committee, Final Report of the Attorney General Committee). In the case of the Open Internet NPRM, the extended comment period resulted in nearly 4 million comments, an unprecedented number. All are available online.

Following the comment period, FCC staff reviews the proposals in light of the public record. The Chairman then presents his proposed order to the Commission for a vote – in FCC lingo, he "circulates" it to the four other commissioners. However, the order is not yet public because it is not yet final; this is the stage of internal deliberations among the Commissioners.

In the case of the Open Internet Order, the Chairman scheduled a final vote for the February 26 public meeting, circulating the order three weeks in advance as required by the Commission's internal procedures. Typically during that three-week period, Commissioners suggest changes to the Chairman's draft. As amended, the proposed order is put up for a vote. But this draft is still not public.

It is understood that independent agencies like the FCC combine attributes of legislators and judges. Like the Congress, FCC rulemakings are open for extensive (in the Open Internet proceeding, extraordinarily extensive) comment. That is what allows the Commission to be both independent and expert. Like the Judiciary, the Commissioners have the opportunity to engage with each other confidentially, and to ensure that written orders fully reflect the back-and-forth of those deliberations.

The confidentiality of the Commissioners' internal deliberations is a critical part of the process, long recognized by the law. So, for example, the Freedom of Information Act (FOIA) – an additional congressional command – contains a statutory exemption protecting the internal deliberative processes of an agency. As explained by the Department of Justice in its Guide to the Freedom of Information Act:

> . . . the general purpose of [the deliberative process privilege] . . . is to "prevent injury to the quality of agency decisions." Specifically, three policy purposes consistently have been held to constitute the bases for this privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are actually adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action.

In other words, allowing the Commission to engage in frank, non-public discussions improves the decision-making process, just as receiving public comments boosts the Commission's expertise.

Why was the Open Internet order not released immediately after the Commission voted on it? Once the vote on a Commission order has been taken, some additional steps remain before the decision is final and ready for public release. For one, Commissioners often prepare individual statements expressing their opinions on the order, and those statements are generally first shared with the other Commissioners and staff. The statements may generate additional internal discussions, during which both the order and the statements may be clarified. In addition, the order itself must address any significant argument made in the statements – or risk being overturned in court for failing to address the issue. This is a very important point – the United States Court of Appeals for the D.C. Circuit has made clear on multiple occasions, as recently as last year, that, "[u]nder the APA, we must set aside orders that are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, 5 U.S.C. § 706(2)(A), [and in] particular, 'it most emphatically remains the duty of this court to ensure that an agency engage the arguments raised before it'.... including the arguments of the agency's dissenting commissioners."

At the same time, final proofreading and nonsubstantive "clean up" edits may be needed. The staff that has been responsible for writing the order is granted "editorial privileges" to prepare and circulate these necessary changes.

Ultimately, a final version is presented to the Commissioners for signoff by all of the Commissioners who voted in favor of the order. Until this is done, the Order is not public because it doesn't fully reflect the full and final views of the Commission. Once the final version has been approved, it is – as the Open Internet Order will be – released to the public on the FCC's web site.

The goal, of course, is to release the final order as soon as possible. But speed is not the only – or even the upmost – goal. The rulemaking process of the FCC was designed by Congress, and is executed by the Commission, to produce rules that will stand the test of judicial review – and of time.

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