

Senator Orrin G. Hatch
Questions for the Record
Senate Judiciary Committee
Subcommittee on Privacy, Technology, and the Law
Hearing: “Examining the Proposed FCC Privacy Rules”
May 11, 2016

Questions for Commissioner Pai

1. In your opinion, does the FCC possess the statutory authority to do what the majority of FCC Commissioners have proposed in the FCC’s privacy rulemaking?

Answer: No. The agency’s proposals rely on a capricious rewrite of the Telecommunications Act and a “virtuous cycle” theory of legal authority that lets the FCC take practically *any* action it thinks necessary. I do not support that reading of the law. I laid out my concerns at length in my dissent to the *Title II Order*; nothing in the D.C. Circuit’s recent opinion convinces me otherwise. Accordingly, I do not believe the FCC possesses the statutory authority to carry out the agency’s proposals.

2. Do you think it makes sense for the FCC to have proposed its privacy rulemaking while the *Open Internet Order* and reclassification are currently being challenged and are pending in the courts?

Answer: I do not.

Having decided to tackle privacy anyway, it would have made sense to propose rules in line with the FTC’s technology-neutral framework for online privacy—a well-established framework that preceded the *Title II Order*. By reclassifying broadband as a public utility, the FCC divested the FTC of its privacy authority over common carriers and created a deep hole in privacy protections. Returning to the status quo ante was all that was necessary to refill that hole, but the FCC refused to take this approach.

3. You dissented from the Commission’s recent decision to impose conditions on the Charter-Time Warner Cable merger on the ground that the conditions “have nothing to do with the merits of the transaction.” Rather, you said, the conditions are “about the government micromanaging the Internet economy.” I’d like to give you an opportunity to expand on your criticisms. Are there other examples where you believe the Commission has used merger conditions to micromanage the Internet? Are you concerned with the direction the Commission is going with regard to its use of merger conditions and its oversight of Internet providers?

Answer: Yes, I am very concerned with the direction the Commission is going with regard to its use of merger conditions and its oversight of Internet service providers. In the Charter-Time Warner Cable merger, for example, the Commission forbid the company from adopting any usage-based pricing, even prohibiting the company from providing discounts to customers who use little data. It mandated settlement-free interconnection and actually went so far as to adopt a four-page document setting forth the details of the company’s interconnection requirements. It embraced rate regulation, ordering the company to offer a 30/4 Mbps broadband service to certain customers for \$14.99 a month and even specified how many households must purchase this service. Notwithstanding its alleged concern about the company’s post-merger size, it required the company to become even bigger by conscripting Charter to build out to two million additional locations (overbuilding one of those two million). It required Charter to report to the Commission the latitude, longitude, address, and 15-digit census block code of every one of those two million locations, along with the date the company passes each location and begins to offer service. It installed an independent monitor within the company to ensure compliance with these onerous conditions. And it imposed many of these conditions for the better part of a decade.

These conditions had nothing to do with preventing any transaction-specific harm presented by the merger. Rather, they simply were another way for the Commission to advance its regulatory agenda.

Unfortunately, this is not the first time that the Commission has misused the transaction review process in this manner. In the AT&T-DirecTV proceeding, for example, the Commission required AT&T to offer a discounted broadband service even though the Commission's economic model predicted very little change in the price of AT&T's stand-alone broadband price post-transaction.

When the Commission instructs a regulated entity that it must offer a particular service for no more than a particular price, there is a name for that. It is called rate regulation. This is what the Commission has done in both the AT&T-DirecTV proceeding as well as the Charter-Time Warner Cable proceeding, and I fear that such rate regulation is merely a preview of coming attractions for the entire broadband industry.

4. In your view, in recent years has the Commission maintained a proper degree of independence befitting its role as an independent regulatory body, or has it allowed itself to be influenced by administration priorities? To what extent do you believe that Commission decisions reflect the independent judgments of Commission members as opposed to the policy preferences of White House officials?

Answer: The FCC's current leadership has not maintained a proper degree of independence. One prime example is the FCC's Internet regulation decision. Indeed, the Senate Committee on Homeland Security and Government Affairs, led by Chairman Ron Johnson, released a report that paints a devastating portrait of the process that led to the adoption of President Obama's plan to regulate the Internet on February 26, 2015. The report explains in painstaking detail how the FCC succumbed to White House pressure and forfeited its independence by agreeing to apply Depression-era rules to the Internet.

5. In your view, is the Commission under its current leadership marked by a desire for consensus and broad-based agreement, or is it marked more by a desire to achieve particular results? Is this a change from previous leadership?

Answer: On a wide variety of issues, from Internet regulation to Lifeline, current Commission leadership is uninterested in reaching consensus, even when it is obvious that a consensus could be reached with a modicum of effort. This is not a subjective view; for instance, the voting statistics from our monthly meetings show that the Commission is mired in unprecedented partisan division. During the first two FCC chairs under which I served, votes at such meetings were without dissent almost 90% of the time; now, the absence of consensus is the new normal. Under the current Chairman, only 45, or 51.7% of open meeting votes have come without dissent; and there were 23 flat-out party-line votes (26.4%). On enforcement matters alone, current FCC leadership has presided over more 3-2 votes than in the previous 43 years *combined*. This is not the way it should be.

And this is not the way it has been. Having served for the better part of a decade as both a staffer and Commissioner under chairs of both parties, I can say with certainty that the agency's leader traditionally has operated more on the basis of consensus. He or she has focused on the facts and law (as opposed to politics) and tried to forge agreement. Even disagreements are voiced agreeably. In my view, the agency is at its best in these circumstances. When the agency speaks with a unified voice, its decisions are more likely to be accepted by the public, approved by Congress, and/or ratified by the courts.

Unfortunately, on several matters, I personally have witnessed that current FCC leadership is more interested in excluding different points of view (including from Democratic Commissioners) and even proactively scuttling an agreement among a bipartisan majority (of which I was a part). Hopefully, the next chair of the agency will return to the traditional way of doing business.