Today, Federal Communications Commission Chairman Ajit Pai announced the initiation of a rulemaking that could lay the groundwork for a reversal of his predecessor's controversial 2015 Open Internet Order (OIO).

By questioning the unprecedented and ill-supported expansion of FCC authority that undergirds the Order, Chairman Pai has taken a crucial step toward re-imposing economic rigor and the rule of law at the FCC.

In seeking to review and correct former Chairman's Wheeler's questionable understanding of both the law and the economics of the OIO, Chairman Pai affirms his understanding that the dynamic Internet economy doesn't lend itself to regulation by rules intended for static public utilities like water or electricity providers. ISPs operate in complex, unpredictable markets and face stiff (and increasing) competition. Regulation by inflexible, one-size-fits-all rules was never suitable.

The 2015 OIO was the FCC's third serious attempt to enact net neutrality rules. Former Chairman Wheeler claimed authority for his endeavor by classifying ISPs as common carriers under Title II of the Communications Act, and he claimed separate authority to impose a sweeping “Internet conduct” rule to micromanage ISPs — ironically, in the supposed service of increasing infrastructure investment.

In fact, the imposition of common carrier rules upon ISPs is a virtual guarantee that investment will subside, innovation will stagnate, and the market will become permanently dominated by a few large companies. As Chairman Pai noted today: “Our nation's smallest providers simply do not have the means or the margins to withstand the Title II regulatory onslaught.”

For many of us the fundamental problem with the OIO is quite simple: The Communications Act, as it currently stands, does not actually authorize the FCC to adopt net neutrality rules. You may
think that’s appalling and surprising, but such are the realities of interpreting and enforcing laws written to govern telegraphs in 1934 (and amended in 1996, but not to address the Internet) to govern 21st-century communications networks.

Of course, there’s a simple solution to that problem: Congress can amend the Act or pass a new law if it decides it wants the FCC to have the authority to implement net neutrality rules.

Chairman Pai’s efforts are an important first step on the road to that eventuality.

Selected ICLE work on this issue:

- The Feds Lost on Net Neutrality, But Won Control of the Internet, *Wired*, [here](#)
- Net Neutrality’s Hollow Promise to Startups, *Computerworld*, [here](#)
- Since When Is Free Web Access a Bad Thing?, *The Wall Street Journal*, [here](#)
- How to Break the Internet, *Reason Magazine*, [here](#)
- Understanding Net(flix) Neutrality, *Forbes, Oregonian Baltimore Sun*, [here](#)
- Net Neutrality is Bad for Consumers and Probably Illegal, *Truth on the Market*, [here](#)
- Court strikes down Net neutrality rules but grants FCC sweeping new power over the Internet, *Truth on the Market*, [here](#)
- ICLE & TechFreedom Policy Comments on Net Neutrality, [here](#)
- TechFreedom & ICLE Legal Comments on Net Neutrality, [here](#)
- ICLE & TechFreedom Comments on Communications Act Rewrite, [here](#)
- *US Telecom v. FCC* (DC Cir.), *Amicus* Brief of ICLE & Leading Law & Economics Scholars, [here](#)
- Thirty-two Scholars of Law and Economics Urge the FTC to Advise the FCC to Employ Case-by-Case Rules in Regulating Net Neutrality, letter to the FTC, [here](#)