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THE UNCERTAIN FUTURE OF THE INTERNET

HEARING

BEFORE THE

SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

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[1] The attachments to Mr. Downes' testimony can be found at *http://docs.house.gov/meetings/if/if16/20150225/103018/hhrg-114-if16-wstate-downesl-20150225.pdf.*

[2] The information can be found at *http://docs.house.gov/meetings/if/if16/20150225/103018/hhrg-114-if16-20150225-sd009.pdf.*

THE UNCERTAIN FUTURE OF THE INTERNET

WEDNESDAY, FEBRUARY 25, 2015

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 10:33 a.m., in room 2322 of the Rayburn House Office Building, Hon. Greg Walden (chairman of the subcommittee) presiding.

Members present: Representatives Walden, Latta, Barton, Shimkus, Blackburn, Scalise, Lance, Guthrie, Olson, Kinzinger, Bilirakis, Johnson, Collins, Cramer, Upton (ex officio), Eshoo, Doyle, Yarmuth, Clarke, Loebsack, Rush, DeGette, Matsui, Lujan, and Pallone (ex officio).

Staff present: Gary Andres, Staff Director; Ray Baum, Senior Policy Advisor for Communications and Technology; Leighton Brown, Press Assistant; Andy Duberstein, Deputy Press Secretary; Gene Fullano, Detailee, Telecom; Kelsey Guyselman, Counsel, Telecom; Peter Kielty, Deputy General Counsel; Grace Koh, Counsel, Telecom; David Redl, Counsel, Telecom; Charlotte Savercool, Legislative Clerk; David Goldman, Democratic Chief Counsel, Communications and Technology; Margaret McCarthy, Democratic Professional Staff Member; Ryan Skukowski, Democratic Legislative Assistant, Jeff Carroll, Democratic Staff Director; Tiffany Guarascio, Democratic Deputy Staff Director; and Tim Robinson, Democratic Chief Counsel.

OPENING STATEMENT OF HON. GREG WALDEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Mr. WALDEN. If Members would take their seats and our guests. We appreciate everyone being here. The subcommittee will come to order. Before we begin, I would like to remind our guests in the audience the chair is obligated under the rules of the House and rules of the committee to maintain order and preserve decorum in the committee room. The chair appreciates the audience's cooperation in maintaining that order.

Good morning and welcome to the subcommittee on Communications and Technology's hearing on "The Uncertain Future of the Internet." Tomorrow, the Federal Communications Commission is expected to adopt an order that may not ultimately provide net neutrality protections for American consumers, that might lay the ground for future regulation of the Internet, that may raise rates for the American Internet users, and that could stymie Internet adoption, innovation, and investment. This Order may be the sal-

vation of edge providers that fear speculative ISP practices or it may be the beginning of regulation of all platform providers wherever they sit on the Internet. We just don't know, and it doesn't have to be this way.

Let us take a moment to point out that Chairman Upton and I asked for this process to be more open than is usual. We asked the Chairman of the FCC to release the draft Order, the rules and the jurisdictional arguments for the rules, before the Commission vote, so that people could really understand what they were getting themselves into. I recognize that it is not customary for the FCC to release its document before a vote, but then again, it is not customary for an FCC proceeding to attract the attention of an HBO comedian or scores of protesters and cat mascots parading in front of the FCC and Chairman Wheeler's Georgetown home, nor is it customary to have the President add his weight to steer an independent agency's decision. Our calls for transparency have been echoed by others to no avail. In short, we are still in the dark on the net neutrality rules, and we don't have to be.

Uncertainty is what we hoped to stave off by introducing legislation that would clearly demarcate the FCC's authority over the Internet. Most of you know I did not see the need for net neutrality rules, and some of my colleagues had to be dragged "kicking and screaming" toward our draft bill. Thanks for that remark, John Shimkus. Despite our reservations, we came to the table with legislation for two reasons. The first is that not one of us disagrees, not one of us disagrees, with the four principles adopted by the FCC in 2005, the first principle being consumers are entitled to access the lawful Internet content of their choice. We all agree on that. Number two, consumers are entitled to run applications and services of their choice, subject to the need of law enforcement. Three, consumers are entitled to connect their choice of legal devices that do not harm the network. And four, consumers are entitled to competition among network providers, application and service providers, and content providers.

The Internet has been a catalyst for our modern information economy and culture precisely because of these guiding principles. But the current draft Order, which will purportedly subject the Internet to monopoly-era regulation under Title II of the Communications Act, threatens to throw all of this out the window and to generate significant uncertainty that will impact the industry, its investors, and ultimately its consumers.

Accordingly, the second reason that we have offered legislation is to quell that wave of uncertainty. No more trips to the D.C. Circuit for the FCC, at least on this issue. Our economy and our communities are better served by ISPs that can invest in services rather than in lawyers. We are all better served by an agency with clear jurisdiction rather than one that engages in policymaking by litigation. I think that this is something that everyone would support, but I have yet to find anyone willing to engage in a real negotiation over what this bill should look like. I am not above asking again. So let's talk about how we can work together to solve the problem and end the uncertainty. The door remains open.

So today our hearing is intended to lay out some of the questions we have been asking and to explore the uncertainty surrounding

these new proposed rules. Our panel of witnesses today contains several veterans of this debate. Mr. Boucher, in particular, welcome back. You sat right here in this very chair with a gavel that looked a lot like this one when the FCC began its first attempt to enforce net neutrality through regulation. It is very good of you to return to talk to us about this same issue today.

I hope that all of us here in the room will continue to engage in a productive dialogue and use the tools at our, and only our, disposal to end the net neutrality debate once and for all.

[The prepared statement of Mr. Walden follows:]

PREPARED STATEMENT OF HON. GREG WALDEN

Good morning and welcome to the Subcommittee on Communications and Technology's hearing on "The Uncertain Future of the Internet." Tomorrow, the FCC is expected to adopt an Order that may not ultimately provide net neutrality protections for American consumers; that might lay the groundwork for future regulation of the Internet; that may raise rates for the American Internet users; and that could stymie Internet adoption, innovation, and investment. This Order may be the salvation of edge providers that fear speculative ISP practices or the beginning of regulation of all platform providers wherever they sit on the Internet. We just don't know and it doesn't have to be this way.

Let's take a moment to point out that Chairman Upton and I have asked for this process to be more open than usual. We asked the Chairman to release the draft Order—the rules and the jurisdictional arguments for the rules—before the Commission vote, so people could really understand what they were getting themselves into. I recognize that it is not customary for the FCC to release its document before a vote, but then again, it's not customary for an FCC proceeding to attract the attention of an HBO comedian or scores of protesters and cat mascots parading in front of the FCC and Chairman Wheeler's Georgetown home. Nor is it customary to have the President add his weight to steer an independent agency's decision. Our calls for transparency have been echoed by others to no avail. In short, we are still in the dark on the net neutrality rules, and we don't have to be.

Uncertainty is what we hoped to stave off by introducing legislation that would clearly demarcate the FCC's authority over the Internet. Most of you know that I did not see the need for net neutrality rules, and some of my colleagues had to be dragged "kicking and screaming" toward our draft bill. (Thanks for that remark, John.) Despite our reservations, we came to the table with legislation for two reasons. The first is that not one of us disagrees with the four principles adopted by the FCC in 2005.

(1) consumers are entitled to access the lawful Internet content of their choice;

(2) consumers are entitled to run applications and services of their choice, subject to the needs oflaw enforcement;

(3) consumers are entitled to connect their choice of legal devices that do not harm the network; and

(4) consumers are entitled to competition among network providers, application and service providers, and content providers.

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sat in this very chair when the FCC began its first attempt to enforce net neutrality through regulation. It's very good of you to return to talk to us about this same issue today. I hope that all of us here in the room will continue to engage in a productive dialogue and use the tools at our, and only our, disposal to end the net neutrality debate once and for all.

Mr. WALDEN. I now recognize the gentlelady from Tennessee for the remainder of my time.

Mrs. BLACKBURN. Thank you, Mr. Chairman. I want to welcome each of you here today. I am one of those that believes the Internet is a bright spot in today's economy. It is not broken, and it does not need the FCC's help in order to be effective. Title II of the Communications Act is the regulatory nuclear option. It will stifle private-sector investment in networks by creating regulatory uncertainty and lead to courtroom challenges. We know that Title II reclassification could result in as much as $11 billion in new fees and taxes.

We welcome you here today. We look forward to hearing your viewpoints and to a lively discussion, and I yield back.

Mr. WALDEN. I thank the gentlelady. I now recognize my friend from California, the Ranking Member of the Subcommittee, Ms. Eshoo, for an opening statement.

OPENING STATEMENT OF HON. ANNA G. ESHOO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. ESHOO. Thank you, Mr. Chairman, and welcome to all of the witnesses, most especially our former colleague who is a Member, a distinguished Member, of this committee both as a chairman of the subcommittee and ranking member of the subcommittee.

Mr. Chairman, I had a wonderful statement that I was going to read, but I received a letter from Engine. It is dated February 18 of this year. It is addressed to the Federal Communications Commission, and I think that what they had to say and the 102 entrepreneurs and start-ups that signed the letter is really an eloquent statement about where we are and where we need to go.

And it reads, "Dear Commissioners. We are the small independent businesses and entrepreneurs that Commissioner Pai referenced in his February 6, 2015, press release about the FCC's impending net neutrality rule-making, and we write to say unequivocally that his release does not represent our views on net neutrality. Quite the opposite. Entrepreneurs and start-ups throughout the country have consistently supported Chairman Wheeler's call for strong net neutrality rules enacted through Title II.

"For today's entrepreneurs and start-ups, failure to protect an open Internet represents and existential threat. Because net neutrality is such an important issue, the start-up community has been engaged in the Commission's open Internet proceeding to an unprecedented degree. The clear, resounding message from our community has been that Title II with appropriate forbearance is the only path the FCC can take to protect the open Internet. Any claim that a net neutrality plan based in Title II would somehow burden 'small independent businesses and entrepreneurs with heavy-handed regulations that will push them out of the market' is simply not true. The threat of ISPs abusing their gatekeeper

power to impose tolls and discriminate against competitive companies is the real threat to our future.

"Contrary to any unsupported claims otherwise, we believe that the outlined proposal that the Chairman circulated last week will encourage competition and innovation by preventing ISPs from using their gatekeeper power to distort the Internet market for their own private benefit. A vibrant Internet economy depends on an open playing field in which small, innovative entrepreneurs can compete with incumbents on the quality of their services, not on the size of their checkbook or their roster of lobbyists. In Verizon v. FCC, the DC Circuit stated in no uncertain terms that without reclassifying broadband under Title II, the FCC cannot impose the bright-line bands on ISP discrimination that start-ups need to compete. As such, any plan that does not include Title II reclassification cannot support strong net neutrality rules. We are pleased that Chairman Wheeler has recognized this simple reality.

"Chairman Wheeler's plan is the best proposal we have seen to date for protecting the open Internet. While there are important details yet to be finalized, the substance of the rules that the Chairman circulated last week are encouraging. Any attempt to undermine the Chairman's proposal through obfuscation and innuendo is not productive and certainly does not represent the opinion of the start-ups and entrepreneurs that have worked so hard to make the Internet great."

And again, the letter is from Engine, and it is signed by 102 start-ups. And obviously that is now part of the record. I also would like to place in the record, ask for unanimous consent to place in the record, the editorial by Chad Dickerson at Etsy CEO that testified before the committee.

Mr. WALDEN. Without objection.

[The information appears at the conclusion of the hearing.]

Ms. ESHOO. I want to yield the remainder of my time—thank you, Mr. Chairman—to Congresswoman Matsui.

Ms. MATSUI. I thank the ranking member for yielding me time, and I welcome the witnesses here today.

The future of this Internet has sparked unprecedented interest. We all know that. Let us not forget that over four million Americans took time out of their day to share their voices with the FCC on the future of the Internet.

The American people overwhelmingly rejected the idea of so-called Internet fast lanes, and as a result, Chairman Wheeler rightly made a U-turn to ban prioritization agreements and as to a ban on paid prioritization is a right move for the future of the Internet.

Tomorrow's FCC vote will not be the end of the road. In some ways the vote will be the beginning of the fight to preserve net neutrality and protect consumers and encourage innovation. That is why it will be critical for the FCC to maintain the flexibility for the Internet age.

I look forward to the FCC's vote tomorrow, and I will continue to work with my colleagues on this moving forward. And I yield back the balance of my time.

Mr. WALDEN. The gentlelady yields back. The chair now recognizes the Chairman of the Full Committee, Mr. Upton of Michigan, for an opening statement.

OPENING STATEMENT OF HON. FRED UPTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. UPTON. Well, thank you, Mr. Chairman. In less than 24 hours the FCC will begin proceedings to green light new net neutrality rules that rely on outdated utility-style regulations to govern the Internet. They are taking this path in part because of the limits on the FCC's statutory authority and in part because of political pressures to act. Unfortunately, whether intended or not, this approach brings with it a host of consequences that have the potential to disrupt the Internet that we have come to know and rely on.

Title II means applying regs that were never meant for this technology or marketplace and relying on unstable legal ground to refrain from applying others. It also means an inevitable return to the courts for net neutrality rules, which will lead to more years of uncertainty for consumers and providers. Until it is resolved, there may be no rules of the road for either consumers or industry.

To avoid this result, Chairman Walden, Thune, and I offered draft legislation proposing net neutrality rules guided by the principles for an open Internet that we all share. Our committee has a rich history of taking on complex and difficult issues and finding common ground that both sides can support.

Given what is at stake here, I had hoped this would be another instance of such bipartisan cooperation. While I knew that not everyone would be interested in the legislative path, I am both surprised and deeply disappointed that we have not yet been able to engage in a negotiation and produce a bipartisan product with our colleagues. But tomorrow's commission vote does not signal the end of this debate, rather it is just the beginning. And I have to believe that as members review the FCC's rules and hear today about the many problems that will result, there will be an opportunity for a thoughtful solution like the one we have offered: bright-line Internet rules of the roads, safeguards to encourage innovation, and enforcement mechanisms that allow the FCC to protect consumers without years of court battles.

A legislative answer to the net neutrality question will finally put to rest years of litigation and uncertainty. Today's hearing will illustrate many of the harms that could come from the FCC's Title II approach to net neutrality. Let us work to avoid those landmines and get this done here, in Congress, where policy decisions should belong. There is no question that Americans deserve the most robust and innovative Internet possible. This requires clear rules tailored to protect consumers and companies. Rules like the ones we have put forward in our discussion draft and the same rules the FCC Chair, President Obama, and Democrats in Congress have sought for years.

Once again, I would urge my colleagues to work with us and help put net neutrality into law in a way that avoids the costly, harmful consequences that we will hear about today. It is the right thing

to do, so let us get it done. I yield the balance of my time to the Vice Chair of the subcommittee, Mr. Latta.

[The prepared statement of Mr. Upton follows:]

PREPARED STATEMENT OF HON. FRED UPTON

In less than 24 hours the FCC will begin proceedings to green light new net neutrality rules that rely on outdated utility-style regulations to govern the Internet. They are taking this path in part because of the limits on the FCC's statutory authority, and in part because of political pressures to act. Unfortunately, whether intended or not, this approach brings with it a host of consequences that have the potential to disrupt the Internet we have come to know and rely on.

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Mr. LATTA. I appreciate the chairman for yielding and thanks very much for witnesses for being with us today. I look forward to your testimony.

The FCC will vote tomorrow on a net neutrality proposal that reclasses broadband Internet access service under Title II of the Communications Act. I strongly disagree with this approach. Time and time again we hear from businesses large and small that the reclassification will disrupt our flourishing Internet ecosystem by stifling innovation and slowing investment. Subjecting a thriving, dynamic industry to navigate the FCC's bureaucracy and red tape will adversely alter the Internet as we know it today.

Furthermore, the FCC's proposal will inevitably introduce legal and certainly due to its lack of statutory authority. The discussion draft brought forth by Chairman Upton and Walden is a strong indication to this issue—pardon me, a strong solution to this issue. A legislative fix will provide regulatory certainty and enact the President's network management prohibitions without treating broadband as a common carrier.

I look forward to the hearing today, and Mr. Chairman, I appreciate you yielding, and Chairman Walden, I yield back. Thank you.

Mr. WALDEN. The gentleman yields back the balance of the time. The chair now recognizes the Ranking Member of the Full Committee from New Jersey, Mr. Pallone.

OPENING STATEMENT OF HON. FRANK PALLONE, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. PALLONE. Thank you, Mr. Chairman. As I have said before, net neutrality is critical because access to the Internet is critical. We go online to apply for jobs, to help our kids with their homework, and to grow our businesses. These are just a few of the reasons why four million Americans reached out to the FCC demanding strong network neutrality protections. Due to this overwhelming civic engagement, we are on the eve of a historic event at the FCC. Tomorrow the Commission is set to put into place what may be the strongest Internet protections consumers have ever had. And for all of you who called in, who wrote in, who came in to support net neutrality, you will see that the FCC and the rest of Washington knows how to listen, even if it doesn't always appear that way.

So I welcome the Republicans' change of heart on their effort to legislate. I remain open to looking for ways to enshrine the FCC's network neutrality protections into law, but our effort can only work if it is truly bipartisan which is why I am baffled about why we are holding this hearing today, Mr. Chairman. Just a few weeks ago this subcommittee met on these same issues. We all heard a number of major concerns with the Republicans' discussion draft. We all heard that these are complicated issues that take more than a few weeks to sort through. This subcommittee and our Full Committee have too much other important work to do to have the same hearings over and over again.

For instance, the FCC just completed the most successful auction in history for our Nation's airwaves. We could be spending this time building on that auction and establishing a spectrum pipeline for the future. We are nearly 2 months into the new Congress with very little to show for it. I think this subcommittee has enough talent to do more than just obsess over one topic at a time. Our constituents expect more of us.

Now once we have all had time to review and evaluate the FCC rules and their effects, we can hopefully look for ways to find and reach consensus on a bipartisan legislative draft, but now is not that time. Now is the time for the FCC to do its work. I know that Chairman Wheeler will do everything in his power to release the FCC Order as soon as he can after the vote. To deliver on that promise, however, the Chairman needs the cooperation of his fellow Commissioners. So I ask all the Commissioners at the FCC, even those who may disagree with the final decision, to work with Chairman Wheeler to make this Order public as soon as possible.

And I now yield the remainder of my time to the gentlewoman from New York, Ms. Clarke.

Ms. CLARKE. I thank our Ranking Member, Mr. Pallone, as well as our Ranking Member, Ms. Eshoo, for yielding me time today. I

would also like to thank our witnesses for lending their expertise to today's hearing.

Mr. Chairman, protecting the free and open Internet is truly and essentially an issue of access to economic opportunity. More than 80 percent of Fortune 500 companies require online job applications. Our constituents simply cannot compete without access to all that the Internet has to offer.

In my district and across our country, people are increasingly moving to their smartphones and tablets as their primary access point to the Internet. That is especially true for the most economically vulnerable Americans. Seventy-seven percent of our low-income families rely on their mobile phones to get on line. So I support making sure that all Americans have open access to the Internet. People should be able to find the content and applications they want, no matter who they are or where they live. They should not be constrained by Internet gatekeepers, and the time has finally come to establish certainty in this regard.

Therefore, I urge the Federal Communications Commission to finish its work. Four million Americans have called in on the FCC to adopt strong network neutrality protections. That eye-popping number demonstrates how important this is. The country has waited long enough.

I thank you, and I yield back.

Mr. WALDEN. The gentlelady yields back the balance of the time. And now we will move forward to hear from our witnesses.

We again thank you all for being here today to share your expertise on this issue as we move forward. I want to start with former chairman of this subcommittee, Mr. Boucher of Virginia, who is with the Internet Innovation Alliance now as the Honorary Chairman. Mr. Boucher, we are delighted to have you back as we have all said, and we look forward to your commentary this morning.

STATEMENTS OF THE HONORABLE RICK BOUCHER, HONORARY CHAIRMAN, INTERNET INNOVATION ALLIANCE; GENE KIMMELMAN, PRESIDENT AND CEO, PUBLIC KNOWLEDGE; ROBERT ATKINSON, FOUNDER AND PRESIDENT, THE INFORMATION TECHNOLOGY & INNOVATION FOUNDATION; AND LARRY DOWNES, PROJECT DIRECTOR, GEORGETOWN CENTER FOR BUSINESS AND PUBLIC POLICY

STATEMENT OF RICK BOUCHER

Mr. BOUCHER. Well, thank you very much, Chairman Walden and Ranking Member Eshoo and other members of the subcommittee. It is a privilege to accept the committee's invitation to return to this very familiar surroundings and to share with you this morning my views on the best way to assure protection for network neutrality.

As the Chairman said in the introduction, I am the Honorary Chairman of the Internet Innovation Alliance. It is a membership organization. We have 175 members including some technology companies. I am also a partner at Sidley Austin. We also there have clients who are telecommunications companies. But here today, I am expressing my own views, not the views of our law firm's clients or of the Internet Innovation Alliance.

From the very time that the debate began about a decade ago on the network neutrality issue, I have been a strong proponent network neutrality and of imbedding a central network neutrality guarantees into our federal law. In those days I joined with now Senator Markey and Congresswoman Eshoo and others on this committee in a legislative effort that at that time was not successful to assure network neutrality guarantees. I remain a strong supporter today of network neutrality as I was then.

I believed then as I believe today that assuring an open Internet is essential to maintaining the Web as a vibrant medium for free expression, for commerce, for education, for healthcare delivery. It is clearly the most capable and versatile communications medium that has been derived to date.

To keep it that way, I am here today to urge that the committee develop a narrow bipartisan bill that gives statutory permanence and an assured legal foundation to network neutrality. I am concerned that if Congress does not act, all protection for network neutrality is at risk of being lost.

FCC Chairman Wheeler has said that his reclassification Order that will be approved tomorrow rests on a stronger legal foundation than the FCC's 2010 Open Internet Order which ultimately was overturned in court. And that may be true. But it certainly is going to be subject to legal challenge. And we can't know today what the outcome that that litigation is going to be. We can predict that the court decision will be years into the future and coming, and that will be at a time that is well into the next presidential administration. We can just look at the timeline for the Verizon decision that declared the Open Internet Order be invalid. That didn't come until more than 3 years after the suit was filed. Three years from now we are into the next administration.

If the Republicans win the presidency in 2016, the next FCC will have a Republican majority, 3 to 2, the mirror image of what it is today. And it would be very unlikely to appeal and adverse court decision or to institute a new proceeding that would establish network neutrality guarantees. In fact, it is very likely that a Republican FCC would move very quickly to reverse tomorrow's classification decision, even if that decision survives court determination.

Tomorrow's reclassification order and the network neutrality principles it embodies truly rests on a tenuous foundation. Without statutory protection, the network neutrality guarantees can be swept away in the next presidential election, and judging from the polling we are seeing today, that is going to be a very close race.

Therefore, my sole purpose in appearing today is to say that legislation is the superior solution. That is true for those of us who strongly support network neutrality guarantees. It is virtually impenetrable to judicial challenge and would resolve the debate with statutory permanence that is simply not available through the regulatory and administrative process.

I know the Democratic members of this committee have raised concerns about the draft that has been circulated by the Republicans, but I would make a couple of points in closing. First of all, as Chairman Walden and Chairman Upton both have indicated, the Republicans have made a major move toward the historic Democratic position in offering to place strong network neutrality

guarantees into federal law. In essence, they are offering to Democrats the very network neutrality principals that, for a decade, Democrats have sought to achieve.

By the same token, Democrats have concerns, and I think it is important for the Republicans to acknowledge those concerns and address them in a bipartisan negotiation. Surely those concerns are subject to resolution. Candidly, I have some concerns about the draft legislation, and if I were on the Democratic side of the dais today, I would be expressing some concerns as well.

In the end, what really matters is two key principles, first, establishing strong network neutrality guarantees perhaps using the FCC's 2010 Open Internet Order as a model and secondly providing a continuation of the light touch information service Title I treatment of the Internet that has welcomed investment and made it a dynamic platform that has become the envy of the world. Everything else should be open to discussion, negotiation, and resolution.

At the moment, both sides have leverage. Both sides have the opportunity to obtain their key priorities, and I very much hope that a conversation will ensue and that you will adopt legislation that does a service for the country and keeps the Internet open and maintains the light touch regulatory treatment that it enjoys today.

Thank you very much for having me here, and I will be pleased to take your questions.

[The prepared statement of Mr. Boucher follows:]

Testimony of
Rick Boucher
Partner, Sidley Austin, LLP
on
"The Uncertain Future of the Internet"
before the
House Energy & Commerce Committee
Subcommittee on Communications and Technology
February 25, 2015

Chairman Walden, Ranking Member Eshoo, other distinguished members of the subcommittee. I very much appreciate the committee's invitation to return to these familiar surroundings and share with you my thoughts on the best way to preserve network neutrality.

From the time of our first debates on this issue a decade ago, I have been an outspoken advocate and strong supporter of net neutrality principles and worked with Senator Markey, Congresswoman Eshoo and others to enshrine those principles in statute.

I believed then, as I believe now, that ensuring an open network is essential to maintaining the Internet as a vibrant medium of commerce and free expression, of education and healthcare delivery. The Internet is the most versatile and efficient communications medium yet devised, and it opens the door for instant information and entertainment availability.

To keep it that way, I'm here today to urge the committee to develop a narrow bipartisan legislative measure that gives statutory permanence and an assured legal foundation to network neutrality.

I recognize the attraction to many of Federal Communications Commission (FCC) Chairman Wheeler's statement that his regulatory proposal provides a stronger legal foundation for network neutrality requirements than the 2010 FCC Open Internet Order which was largely

invalidated by the US Court of Appeals. However, I'm concerned that the path that has now been chosen by the FCC will inevitably lead to years of continued uncertainty. I am concerned that either through successful court challenges or through actions of a future FCC with a different partisan majority than the current FCC, all network neutrality protections may be lost.

The timeline for the litigation that followed promulgation of the FCC's 2010 Open Internet Order is instructive. The US Court of Appeals decided the case more than three years after the FCC issued the rules. If that same timeline applies to the inevitable litigation which will challenge the rules the FCC's will adopt tomorrow, a court decision will not be made until well into the next Presidential Administration.

If a Republican wins the 2016 presidential election, the new Administration would be unlikely to support a writ of certiorari to the U.S. Supreme Court if the rules are struck down by a U.S. Court of Appeals. It would be unlikely that in such an event the FCC in a Republican administration would initiate a new network neutrality proceeding. In fact it is probable that an FCC with a Republican majority would, as an early order of business, undertake a reversal of the reclassification order that will be approved tomorrow.

For these reasons, the network neutrality assurances of tomorrow's reclassification order rest on a tenuous foundation. They are at risk of being lost. Legislation is, therefore, a superior solution . It would be virtually impenetrable from a judicial challenge, and would resolve this debate with a statutory permanence and degree of certainty not available through the regulatory process.

Chairmen Upton and Walden, along with Senate Commerce Committee Chairman Thune, have circulated a legislative draft and invited a bipartisan discussion with Democratic colleagues

on its provisions. Given the decade-long history of the debate on this measure, with which most of us are familiar, the Republican offer of passing legislation that contains strong network neutrality principles is a major development. In essence, the committee leadership is now offering the kinds of network neutrality assurances Democrats have been seeking for the past decade.

The legislation is based on the provisions of the FCC's 2010 Open Internet Order. It would codify transparency requirements and prohibitions against blocking, throttling, and paid prioritization. The legislation would provide a strong legal foundation for network neutrality principles. Nothing can provide greater legal certainty than specific requirements imposed by Congress under a new provision of law.

In addition to ensuring strong network neutrality guarantees, the legislation should also maintain the light regulatory touch that broadband has received as a Title I information service. The current regulatory structure for broadband has opened the door for investment and produced in the United States the world's most capable Internet infrastructure and ecosystem.

I know that committee members have expressed concerns about specific provisions of the draft legislation. These matters can be the subject of bipartisan discussion and resolution. In the end, what matters is that network neutrality principles along the lines of the 2010 Open Internet Order receive statutory protection and the Internet remains an information service lightly regulated under the provisions of Title I. All other provisions should be seen as negotiable.

I know that all members are committed to ensuring the vibrancy of the Internet. After more than a decade of wrangling about the proper regulatory classification of broadband services and the scope of the FCC's authority, it is time for Congress to provide the certainty that

consumers and industry need. This subcommittee has worked on a bi-partisan basis to produce dozens of laws that have shaped the communications sector, fostering innovation, economic growth, and job creation. I hope that it will do so again now when the assurance of an open Internet is at stake.

Mr. WALDEN. Mr. Boucher, thank you very much for your testimony and your comments.

We now go to the President and CEO of Public Knowledge, Gene Kimmelman, not a stranger to our committee. We welcome your comments as well, sir.

STATEMENT OF GENE KIMMELMAN

Mr. KIMMELMAN. Thank you so much, Mr. Chairman, Ranking Member Eshoo, members of the subcommittee. On behalf of Public Knowledge, which is a non-profit that promotes creativity, freedom of expression on open communications platforms, I am pleased to appear before you this morning, and I am most honored to join with millions of consumers, citizens, civil rights activities, start-up companies, small businesses, to praise the direction that Chairman Wheeler at the FCC is going in his proposed rules for open Internet because it is those rules that will do more for our society to promote freedom of expression and opportunity on what has become the most important platform for economic opportunity, social mobility, as Mr. Boucher said, education, healthcare. That is the Internet. These rules are critical.

The proposed rules as we understand them actually follow a long tradition of the FCC flexibly applying the mandate that this Congress has directed it to follow in preventing discriminatory practices that are unjust and unreasonable on communications platforms. They are perfectly aligned with what this Congress has asked in the past and update in conjunction with all the innovation and technology that we have seen exploding in this space, the fundamental principles that are necessary to promote freedom of expression.

It is the Title II principles that have been undergirding through all of our communications infrastructure the exposure and investment, the tremendous innovation in telecommunications that we have experienced in the last few decades, and the enormous growth in the Internet economy. It is those same principles the FCC is applying as we understand it in tomorrow's ruling.

We think this just continues through light touch regulation as again Mr. Boucher referred to, the approach that this Congress has always been asking the FCC to be sensitive to with clarity in its policing tools that are necessary to guide an open Internet and prevent unreasonable discrimination on that platform. We believe that is all they are doing.

Now, I understand from the comments made already this morning and more that we will hear that there are questions about regulation. There are questions about how to apply them. There are questions about how far they go. It is not unreasonable. It is not the first time. This is my third decade of going through debates about common carriage and discrimination going back to the breakup of AT&T through the computer inquiry, through the 1996 Act, and now into the Internet era. These are the very same important principles to discuss.

But here is one thing I would like to highlight. I don't know Chairman Wheeler that well. I have come to know him better in the last few years, given where he sits and what he has said, and here is what I have seen. This is a chairman of the FCC who is

very sensitive to the need for investment in infrastructure and expansion of broadband opportunities for Americans. This is a chairman who my perception is wants to regulate as little as possible to accomplish the goals that Congress has directed him to accomplish. And I therefore feel very confident that he is attuned to all the concerns that you are raising, he has listened to the public's input, and that these proposed rules as we know them are likely to be consistent with that.

So while I fully understand the interest in legislating, I would urge you today to sit back and see what is put forward tomorrow. See what will work and what you think won't work and then consider what Congress rightfully needs to do to step in and address those concerns. But I will also suggest please consider if you are legislating addressing all the other concerns that have been legitimately raised about potential shortcomings in the Communications Act.

In that endeavor, we look forward to working with you as you move forward. Thank you so much, Mr. Chairman.

[The prepared statement of Mr. Kimmelman follows:]



Testimony of Gene Kimmelman
President
Public Knowledge

Before the
U.S. House of Representatives
Energy and Commerce Committee
Subcommittee on Communications and Technology

Hearing On:
The Uncertain Future of the Internet

Washington, DC
February 25, 2015

Testimony of Gene Kimmelman
President, Public Knowledge

Before the
U.S. House of Representatives
Energy and Commerce Committee
Subcommittee on Communications and Technology

Hearing on: The Uncertain Future of the Internet

February 25, 2015

Public Knowledge[1], along with millions of consumers, civil and media rights groups[2], small businesses, and innovative start-up companies, believes that application of Title II authority under the Communications Act is critical to preserve and promote an open Internet that is affordable to all and fully supportive of freedom of expression[3]. We therefore support the Federal Communication Commission's (FCC) current efforts to adopt Title II rules in response to the most recent DC Circuit court ruling. The importance of maintaining an open Internet has long been a bipartisan consensus that has over the years led to the need for establishing high level, light-touch rules of the road for Internet access service providers. Public Knowledge also believes it is entirely appropriate for Congress to consider updating the Act to address inadequacies in law and to guide the FCC's understanding of Congressional intent.

Public Knowledge cares about keeping the Internet open because the Internet has become – as Congress has repeatedly recognized in past legislation[4] – the essential communications service of the 21st Century. As communication, commerce, and civic engagement increasingly depend on broadband Internet access, it becomes even more critical to ensure that the Internet remains open for all Americans to participate online to the best of their abilities. Fortunately, in Title II, Congress has already given the FCC the flexibility to do just that.

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[1] I would like to thank Harold Feld, Kate Forscey, Jodie Griffin, Chris Lewis, and Michael Weinberg for their substantial contributions to this testimony.

[2] *See* Open Letter to Latino Community Urging Support for Real Network Neutrality, signed by the National Hispanic Media Coalition, Center for Media Justice and other groups (July 14, 2014). Available at http://centerformediajustice.org/2014/07/open-letter-to-latino-community-urging-support-for-real-network-neutrality/

[3] *See* Letter from Voices for Internet Freedom to Tom Wheeler, Chairman, FCC, GN Docket No. 14-28 (Nov. 3, 2014), http://apps.fcc.gov/ecfs/document/view?id=60000978248; Letter from Comptel, Engine, the Computer & Communications Industry Ass'n, and Internet Freedom Business Alliance to Tom Wheeler, Chairman, FCC, GN Docket No. 14-28 (Dec. 30, 2104), http://apps.fcc.gov/ecfs/document/view?id=60001011438; Jonathan Weisman, *Shifting Politics of Net Neutrality Debate Ahead of FCC Vote*, N.Y. Times (Jan. 19, 2015) ("The F.C.C. has received four million comments on net neutrality — overwhelmingly in favor — ahead of its Feb. 26 decision day.").

[4] Broadband Data Improvement Act, Pub. L. No. 110-385, § 102 (2008).

The Success of the Internet is Based on Open Internet Principles

From the early stages of the Internet the concept of an open Internet allowed online innovation and investment in new technology to flourish. The principles of no blocking of content or devices, no harmful discrimination, and transparency were understood and protected by law, regulation, and precedent on the telephone network.

As the Internet was built on top of the phone network, it continued to assume these principles. Early dial-up Internet users were only allowed to attach modems to the network due to Title II protections of the *Carterfone* decision, which ensured users' right to connect any legal device to the network. Nondiscrimination principles allowed competition to flourish in the early 1990s as competitive Internet Service Providers (ISPs) and other services were guaranteed access to phone lines to provide their services. The early pioneers of the commercial web interface also credit their ability to innovate to the permission-less nature of the network.[5] These pioneers confirm that the Internet would never have developed as rapidly into broad commercial use if online services and content creators were required to ask telecom or cable network providers permission to develop new interfaces, services, and products online. Even in 2005 as the FCC chose to reclassify all forms of broadband as Title I services, the Commission maintained the commitment to open Internet principles. In a bipartisan, unanimous vote, the FCC *Internet Policy Statement* made clear that open Internet principles were a core expectation for ISP practices.

The DC Circuit Court[6] and the FCC have both recognized the importance of financial investment in all layers of the Internet in its rapid development and success. This concept of the virtuous cycle of investment posits that broadband networks enable the development of online services and that innovative and compelling online services drive demand for faster networks and greater bandwidth. This demand drives investment in more powerful networks and enables even greater innovation and creativity in online services. Indeed, as several companies have openly acknowledged, applying Title II to Internet access service will not impede carriers' network investment.[7] Tech investors and venture capitalists have been some of the most strident supporters of open Internet rules[8] due to the importance of the virtuous cycle and the need to provide investors with confidence that the online services and edge providers they support will be free to compete and innovate with incumbent services without permission or payment to play.

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[5] http://www.biztechmagazine.com/article/2014/03/sir-tim-berners-lee-calls-net-neutrality-25th-anniversary-web

[6] Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).

[7] *See* "Letter from Sprint to Chairman Wheeler" Stephen Bye, Sprint CTO, GN Docket 12-48 (Jan 15 2015); "Verizon Admits Utility Rules Won't Harm FiOS and Wireless Investment," Ars Technica (Dec. 10, 2014) Available at http://arstechnica.com/business/2014/12/verizon-admits-utility-rules-wont-harm-fios-and-wireless-investments/; "Google: 'Strong net neutrality rules won't hurt rollout of Google Fiber,'"Washington Post (Jan. 27, 2015) Available at http://www.washingtonpost.com/blogs/the-switch/wp/2015/01/27/google-strong-net-neutrality-rules-wont-hurt-the-future-rollout-of-google-fiber/; "Comcast, Charter, and Time Warner Cable All Say Obama's net neutrality plan wouldn't hurt investors," Washington Post (Dec. 6, 2014) http://www.washingtonpost.com/blogs/the-switch/wp/2014/12/16/comcast-charter-and-time-warner-cable-all-tell-investors-strict-net-neutrality-wouldnt-change-much/

[8] *See* "Open Internet Investors Letter to Chairman Wheeler" (May 8, 2014). Available at https://docs.google.com/document/d/1v34_bFesbfyF_MbQgtZtUQNfSByAgUKTICEB9pjH3jk/pub; *see also* Nick Grossman, "Defending the Open Internet," *The Slow Hunch* (May 8, 2014). Available at http://www.nickgrossman.is/2014/05/08/defending-the-open-internet/.

The Certainty Provided By Title II Based Open Internet Rules

For the last decade the FCC has worked to solidify open Internet rules in a way that maintains the virtuous cycle of investment and protects consumers. There is plenty of evidence that the threat to the open Internet is real. The difficulty that an average customer has in detecting forms of discrimination or throttling makes the need for bright line rules even greater. The first publicly reported complaint of blocking was the 2005 *Madison River Case* and it would not have been detected but for the technical expertise of the consumer involved. Major ISPs have admitted on the record[9] what the Department of Justice[10] and the courts have confirmed: that there is business advantage in blocking some online traffic or even degrading the quality of specific online services that compete with ISPs' offerings. Fortunately the Communications Act provides the FCC with several tools to address these business practices and preserve the open Internet.

There seems to be much agreement that the FCC is empowered to act to create basic open Internet rules given the widespread support for the rules created in 2010. Many major ISPs supported the *2010 Open Internet Order* and although Public Knowledge raised several concerns about the legal strength of the Order, we and other public interest groups worked to live under them, including using those rules to raise concerns about specific ISP practices.[11] The D.C. Circuit's *Verizon* decision confirmed our worries about the 2010 rules when the court vacated the rules and remanded them back to the FCC for action. Moreover, the D.C. Circuit Court decision in *Verizon* pointed to reclassification as the only option under the FCC's current authority which the FCC might use to institute true non-blocking and non-discrimination rules.

Title II based open Internet rules need not be burdensome to ISPs. The ability of the FCC to forbear from regulations and sections of Title II is well established and has been used in the past for mobile voice services that fall under both Title II and Title III authority. Chairman Wheeler should be commended for the proposal he publicly outlined earlier this month as he circulated his detailed proposal with his FCC colleagues. His public outline used a scalpel instead of a cleaver to carefully forbear broadband access services from provisions that did not apply to them, respecting the need to protect investment in the network side of the virtuous cycle. Chairman Wheeler explicitly ruled out subjecting ISPs to rate regulation, and addressed concerns about the potential for immediate new fees resulting from the expansion of Universal Service contributions to broadband. Chairman Wheeler's proposal provides certainty for consumers, ISPs, edge providers, and investors. It respects the balance of the virtuous cycle of investment, gives the market clear light-touch rules of the road, and gives everyone a place to bring complaints and examine network practices.

Open Internet principles are not the only values that are important for serving the public interest when it comes to broadband networks. In a unanimous 5-0 vote of the FCC in January 2014, the Commission affirmed that the Communications Act had always embodied broader, fundamental values of service to all Americans, competition, consumer protection, and public

[9] *See* Michael Weinberg, "But For These Rules...." *Public Knowledge Blog* (Sept. 10, 2013). Available at https://www.publicknowledge.org/news-blog/blogs/these-rules.
[10] Competitive Impact Statement of United States, *et al.*, *United States v. Comcast Corp.*, (D.C. Cir. 2011) at 11.
[11] https://www.publicknowledge.org/news-blog/blogs/holding-att-to-account-for-blocking-facetime-on-iphones-and-ipads

safety.[12] Referred to as the Network Compact by Chairman Wheeler, these values are the bedrock of the Americans' expectations of their phone network, and increasingly, communications networks generally. Diverse stakeholders[13] agree that as voice, data, and other services converge onto all Internet Protocol (IP) communications networks, the Network Compact values must continue to be protected in order live up to the charge of the Communications Act and the expectations of consumers.

When the D.C. Circuit made it clear in the *Comcast* case that it intended to dramatically scale back the applicability of ancillary jurisdiction, Public Knowledge was the first organization to urge the FCC to reclassify broadband as a Title II service because only Title II could provide adequate authority to protect an open Internet and preserve other basic values of the Communications Act.[14] To his credit, Chairman Wheeler's open Internet proposal also allows the FCC to preserve the Network Compact principles by not forbearing from sections of Title II that empower the FCC to further investigate how to maintain the Network Compact values for broadband. The FCC has an ongoing proceeding on the topic of the tech transitions and Public Knowledge supports further inquiry into these protections in that docket.[15]

Open Internet Rules Set An Example For Global Internet Freedom

Far from encouraging censorship, open Internet rules embody a commitment to neutral networks, where content is free from interference by private or governmental parties. Some critics of open Internet rules have raised concerns that the Wheeler open Internet proposal will send the wrong message to countries and world leaders who wish to censor Internet content and prohibit free speech online. On the contrary, open Internet rules provide a great example for the world and demonstrate the United States' commitment to opposing gatekeepers online, whether they are from industry or government. Concerns to the contrary have no basis in fact and are simply a scare tactic to divide the long bipartisan consensus around Internet governance on the world stage demonstrated by unanimous Congressional resolutions on the International Telecommunications Union (ITU) meetings in the last two Congresses.[16]

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[12] Technology Transitions (GN Docket No. 13-5); AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition (GN Docket No. 12-353); Connect America Fund (WC Docket No. 10-90); Structure and Practices of the Video Relay Service Program (CG Docket No. 10-51); Telecommunications Relay Services And Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities (CG Docket No. 03-123); Numbering Policies for Modern Communications (WC Docket No. 13-97) (adopted Jan. 30, 2014); *see also* Statement of Chairman Tom Wheeler, "Adapting Regulatory Principles to 21st Centuries and Markets," (Jan. 9 2014). Available at http://www.fcc.gov/blog/adapting-regulatory-frameworks-21st-century-networks-and-markets.

[13] *See* Testimony of Jodie Griffin, Senior Staff Attorney, Public Knowledge, before Committee on Commerce, Science, and Transportation, "Hearing on Preserving Public Safety and Network Reliability in the IP Transition," (Jun 5, 2014); *see also* "COMPTEL Proposes Managerial Framework to Successfully Guide the Technology Transitions," *Comptel Press Release*, (April 2, 2014). Available at http://www.comptel.org/Files/filings/2014/04-02-14_Framework_release.pdf; see *Comments of AT&T on Proposal of Iowa Network Services, Inc. for Service-Based Technology Transitions Experiment*, GN Docket 12-353 (filed Mar. 21, 2014), at p. 2 ("...the enduring social values - ensuring universal connectivity, consumer protection, public safety, reliability and competition - that much continue to provide the foundation for communications policies in the 21st Century").

[14] *Ex parte* Submission of Public Knowledge, GN Docket 09-191 (filed Jan. 28, 2010).

[15] https://www.publicknowledge.org/assets/uploads/blog/15.02.05_Tech_Transitions_Comments.pdf

[16] H.Con.Res. 127, passed 08/02/2012.

The United States will not be the first major western nation to create strong open Internet rules under an authority like Title II, and yet European and Canadian open Internet rules have never generated concerns about the reactions of restrictive countries. These same concerns were raised in 2012 in the lead up to the ITU's World Conference on International Telecommunications (WCIT) which we attended. At that time, the 2010 rules were still in effect, but FCC Chairman Genachowski had not closed a still open docket on the topic of Title II reclassification. Many commented that sending a delegation to the WCIT while the Title II docket remained open at the FCC would give aid and comfort to nations like China and Russia. Yet at the WCIT there was no public mention of the FCC's open docket and the United States and other delegations stood firm on their platform of Internet freedom.

This unvalidated concern ignores the fact that the ITU has already labeled broadband as a "telecommunications" service, just like Title II. It ignores that the United States and supporting countries successfully defeated efforts to give the United Nations control of the Internet in the past, while DSL Internet access was classified as a Title II service. Light touch Title II open Internet rules remain consistent with the bipartisan positions of the United States on Internet freedom and governance and can serve as an example of how Americans protect their citizens access to every corner of the web.

Most importantly, the United States should not allow nations such as China and Russia dictate our telecommunications policy through fear of the ITU. We must make our own choice as to what policies best serve the people of the United States, and how best to protect and preserve the fundamental values that are the bedrock of communications policy. It would be an act of fundamental cowardice to refuse to classify broadband as Title II for fear of provoking some unfavorable reaction from foreign dictators already seeking to leverage the ITU processes to their advantage.

Congress Must Preserve Strong Open Internet Rules and Consumer Protections

While Public Knowledge expects that the Wheeler open Internet proposal due to be voted on tomorrow is carefully crafted and will provide the certainty and protections consumers demand, we also recognize that Congress is considering various avenues of legislation that may impact these rules from narrowly focused open Internet bills to whole updates of the Communications Act. We continue to offer our organization as a resource to Congress as it considers these proposals, including our ongoing participation in Chairman Upton and Walden's ongoing Communications Act Update white paper process. The jurisdiction and authority of the FCC in the Communications Act is a careful balance of priorities, that must allow for a flexible agency that can keep up with the rapid pace of change in the information and communications technology sector.

When Congress has legislated to exercise appropriate oversight, it has generally recognized the need to preserve regulatory flexibility by enhancing rulemaking authority. Congress' actions in 1993,[17] which lay the foundation for the modern wireless industry, illustrate how Congress has exercised its responsibility for oversight and used its legislative authority to direct the

[17] Omnibus Reconciliation Act of 1993, Pub. L. No. 103-66, enacted August 10, 1993.

Commission. For more than a decade, the FCC struggled to find the appropriate regulatory framework for mobile wireless voice services. The Commission relied on case-by-case adjudication to determine which services were subject to Title II and thus eligible for interconnection rights and access to phone numbers, and which services were not. (It is important to stress that the nascent wireless industry ***wanted*** to be classified as a Title II service to gain the pro-competitive benefits of Title II classification.)

The 1993 Act included numerous innovations.[18] Most importantly, Congress replaced the FCC's case-by-case adjudication with a regulatory classification for "commercial mobile radio service" (CMRS). While specifying the general principle for common definition, it explicitly required the FCC to define the statutory terms via regulation. Congress also explicitly classified CMRS as Title II, but gave the FCC the flexibility to forbear from any provisions that it found unnecessary.

As this example shows, and as Congress has repeatedly recognized in its periodic updates of the Communications Act, rulemaking authority provides critical flexibility for the Commission to adapt existing rules to rapidly evolving technology and the ever-shifting marketplace. A statute captures a single moment in time. It works best, therefore, when focused on broad and timeless principles -- fundamental values such as the bipartisan Network Compact -- rather than trying to account for every single detail.

The one exception to this pattern was when Congress passed the Cable Act of 1984. In an effort to provide "certainty" and "clarity," Congress stripped both the FCC and local franchising authorities of the bulk of their consumer protection authority. Congress instead included specific provisions to address the handful of specific issues that had emerged in the 15 years the FCC had regulated cable pursuant to its ancillary authority. Congress assumed that by legislating in detail, and addressing the problems immediately before it, the 1984 Cable Act would promote both competition and innovation to the benefit of consumers.

Instead of promoting competition and innovation to the benefit of consumers, the 1984 Cable Act created a concentrated industry marked by escalating prices and poor customer service. Cable operators, free from regulatory oversight, worked quickly to crush incipient competition and leverage their control over programmers. The situation deteriorated so rapidly and thoroughly that, after only eight years, Congress enacted an almost complete and sweeping reversal of its 1984 legislation. The Cable Consumer Protection and Competition Act of 1992, unlike its 1984 predecessor, empowered the FCC to address anticompetitive practices and promote competition in broad terms.

The FCC needs rulemaking flexibility. Without rulemaking authority, the FCC cannot address new circumstances that have ***already*** become part of the public debate. Nor can it address pressing consumer protection issues, as envisioned when the FCC initially classified broadband as an information service.

The lack of strong rulemaking authority of the Federal Trade Commission is frequently cited as one of the weaknesses of the agency, and specifically one of the reasons why it cannot

[18] For example, the 1993 Act gave the FCC the authority to conduct spectrum auctions, which it left to the FCC to define by rule subject to guidance from Congress on general principles. *See Id.*at § 309(j).

adequately address concerns about network neutrality. While adjudication is a useful tool in specific circumstances, it does not replace the ability of rulemaking to respond to changes in a dynamic marketplace.[19] The process of rulemaking allows all stakeholders to come together in a well-defined and deliberative process subject to judicial review. It allows the FCC to keep itself informed of technological and marketplace developments, and to make necessary adjustments or correct mistakes.

Rulemaking also provides certainty. It ensures consumers can expect the same level of protection for a service regardless of the specific provider or the specific facts of any given case. It simplifies the process of consumer protection for both consumers and the agency. Development of a body of case law takes time, and litigating the first cases can create enormous expense. Congress should avoid legislation with rigid rules and no FCC flexibility for future rulemakings. Such a bill could open the door to endless litigation as the only means to clarify the statutory language. Rather than permitting consumer protections to evolve in concert with the changing broadband marketplace and adjust to changes in technology, the shift to adjudication will create ossification and leave consumers dangerously exposed as a body of relevant case law slowly develops.

Even while the FCC spent the last decade considering other sources of rulemaking authority, the FCC explicitly left Title II as an option should it ever become necessary. If Congress intends to remove this option, it needs to provide the FCC with an equally flexible tool to replace Title II and preserve open Internet and basic Network Compact protections. In our testimony before the Senate Commerce Committee on January 21, 2015[20] we detailed the specific weaknesses of the Thune/Upton draft bill including its removal of FCC rulemaking authority over broadband.

Those seeking to limit FCC authority like to recite the mantra "first do no harm." While we appreciate Congress's role in updating the Communications Act periodically, we remain concerned that current legislative proposals are likely to cause more harm than benefit. We urge the FCC to move forward on Title II rules and urge Congress to evaluate those in light of broader policy goals.

The history of the development of our modern communications landscape demonstrates that Title II preserves critical values, promotes competition and investment, and is flexible enough to accommodate changes in technology and the marketplace. The concerns that Title II is insufficiently flexible for broadband can – and should – be thoroughly examined in this fuller context. In doing so, Congress can continue to protect the fundamental values of our communications system.

[19] http://www.law360.com/articles/594183/brill-sees-ftc-role-in-net-neutrality-but-no-solo-spotlight
[20] https://www.publicknowledge.org/assets/uploads/blog/Kimmelman_Testimony.pdf

Mr. WALDEN. Mr. Kimmelman, thank you for your testimony as always. I would just point out that we are not doing a mark-up today on legislation. We actually have said we are not going to do a mark-up until we see what the FCC does, but we wanted to hear from people like you about what you know about the Act at this point or the Order at this point.

We will go now to Mr. Atkinson, the Founder and President, Information Technology & Innovation Foundation. Mr. Atkinson, we are delighted to have you here this morning to get your perspective. Please go ahead.

STATEMENT OF ROBERT ATKINSON

Mr. ATKINSON. Thank you, Chairman Walden and Ranking Member Eshoo and members of the subcommittee. ITIF is a think tank that focuses on advancing innovation and smart innovation policy.

Let me start by arguing that I think it is time we should consign the term net neutrality to the dustbin of history. It is a misleading term. It is a bias term that has driven the debate to the false conclusion that there is a one-size-fits-all Internet and that absent Title II, Internet Armageddon is one decision away.

Neither of these claims are true. Instead, what we need to be talking about is the need for effective network policy for the 21st century. Ten years from now our goal should be to have a better, smarter Internet than we have today, and to be sure, it should be a network that effectively polices abuses. We have been and have continued to be long supporters of the view that Internet providers should not be able to capriciously block or degrade or create pay-to-play, forced pay-to-play. That has been our position for 8 years now in the debate. And when we see other nations that are doing things like shifting to a carrier-pay model or allowing blocking competing applications, for example, of VoIP, we strongly oppose those and rules should do that.

But we also need a network that supports a rich diversity of applications with the optimal levels of performance. This is not the telephone era where you have one application riding on one wire. What you have are multiple different applications with multiple different needs all riding on one wire.

So the idea that we should have a rigid regulatory scheme that requires all traffic to be delivered the same way is a little bit like saying that we should force bicycles and mopeds to drive on the interstate with sports cars and tractor trailers. Or it is a little bit like the Postal Regulatory Commission telling the U.S. Postal Service that they can no longer have Priority or Express Mail. You can only deliver mail at one speed, and that is really what we are talking about here.

So in other words, there are two threats to the Internet today, or potential threats. One is unreasonable discrimination which we have seen frankly very, very little of, and the other is the risk of a dumb static network that doesn't evolve as the Internet economy evolves. Title II in our view is a bad idea because it embodies the second of those two visions instead of the first.

But Title II is a bad idea not just because of its rigidity but because of the uncertainty it puts industry, both network providers and edge providers under. As the Honorable Rick Boucher said, the

notion that Title II is going to put regulations on a sure footing is simply wrong. To think that Title II will provide certainty for anyone but the FCC is a pipe dream. As Dr. Boucher referred to, there will be significant legal challenges, significant legal uncertainty, and certainly political uncertainty. Whoever the next president is, could go in either direction, could go towards banning, going back to Title I or could go and say we are going to reverse any kind of forbearance actions that this current FCC Chairman is committed to. So we just simply have no idea what is going to happen.

Significantly, if Title II goes forward, there is also going to be uncertainty over its implementation. Chairman Wheeler has tried to mollify critics saying that he will forbear and forbear from this and from that and from this. But the fact that he has to give assurances is proof that Title II is a kludge of a solution. It is not a solution when you have to take whole components of it and move it off the table. It is a little bit trying to fit the square peg of a smart network policy into the round hole of Title II Telephone Regulation.

The other problem or challenge with the Chairman's actions is that many groups are going to file petitions in terms of forbearance. We already have some groups already, and I will refer to my colleague, Gene Kimmelman's organization. Public Knowledge has asserted just last week that they intend to push to use Title II to require broadband providers, including new entrants into the marketplace with innovative business models deploying fiber, to serve all areas of a community at once. This may or may not be a valid view. In our view, it is not. But it has nothing to do with net neutrality.

We have seen Free Press state, "with Title II, we have the legal authority to win the battles that are coming around the bend." So this is not really an argument about net neutrality. This is an argument about broad-based regulation of network providers.

So going forward, the only way in our view to achieve certainty, for edge providers and network providers, is congressional legislation, and to achieve that certainty, we would argue that balance needs to be the watch word as you go forward, and we need to have balance between the edge and the core. We need balance between requiring a one-size-fits-all dump pipe and allowing capricious discrimination, neither of those solutions is the right way. And frankly, we need balance between the over governance of Title II and the under governance of doing nothing.

We believe that it is possible and desirable to get that kind of solution that serves everybody's interest in the debate. There is a real moment of opportunity. What we have heard today is a broad consensus on the principles, and we believe that Congress should work together to draft the kind of framework we need for network policy for the 21st century.

Thank you for the opportunity to appear before you.

[The prepared statement of Mr. Atkinson follows:]

ITIF | INFORMATION TECHNOLOGY & INNOVATION FOUNDATION

Testimony of

Robert D. Atkinson, Ph.D.

Founder and President

The Information Technology and Innovation Foundation

on

"The Uncertain Future of the Internet"

Before the

House Energy & Commerce

Subcommittee on Communications and Technology

February 25, 2015

Introduction and Summary

Chairman Walden, Ranking Member Eshoo, and members of the Subcommittee, thank you for inviting me to share the views of the Information Technology and Innovation Foundation (ITIF) on the path forward to preserve and enhance the open and vibrant Internet. The Information Technology and Innovation Foundation (ITIF) is a non-partisan research and educational institute—a think tank—whose mission is to formulate and promote public policies to advance technological innovation and productivity internationally, in Washington, and in the states. Recognizing the vital role of technology in ensuring prosperity, ITIF focuses on innovation, productivity, and digital economy issues. We have long been involved in the open Internet debate, with a goal of articulating appropriate methods to promote a dynamic Internet ecosystem and I very much appreciate the opportunity to comment on those methods here today.

Early in the debate, which has now been ongoing for over a decade, we recommended a "third way" approach to what should really be described as network policy, rather than the loaded and biased term "network neutrality."[1] Any network policy for the 21st century recognizes that the Internet is not inherently "neutral" and that while some forms of traffic differentiation can be anti-consumer or stifle innovation, others forms can enable innovative new services. This approach also recognizes the need for innovation and investment not just at "the edge" among content and application developers, but also within the network itself. A balanced set of regulations and ongoing oversight is appropriate to both allow innovation and

[1] Robert D. Atkinson and Philip J. Weiser, "A 'Third Way' on Network Neutrality" May, 2006, http://www.itif.org/files/netneutrality.pdf. Not to be confused with Chairman Julius Genachowski's "Third Way" proposal.

consumer-welfare enhancing network prioritization while at the same time policing commercially unreasonable and anti-competitive conduct.

The time has come to clarify the Federal Communications Commission's (FCC) jurisdiction and give it the tools of precision it needs to ensure the Internet—at both the core and the edge—continues to be the fount of innovation and creativity we enjoy today. Unfortunately, the FCC is poised to redirect its broadest and most powerful provisions, Title II, to regulate broadband. Where we need a scalpel, the FCC is picking up a sledgehammer.

Not only is Title II overly broad, it also introduces significant uncertainty into the system. It is unclear how courts will view this unprecedented move, it is unclear how future Commissions will treat this authority, and it is unclear how these changes will affect innovation in the throughout the entire network. Reclassification risks untold unintended consequences, including higher network costs, reduced network performance, and reduced network investment.

Happily, there is broad agreement on the high-level principles of net neutrality, and Congress can easily bring closure to this debate. A legislative solution should first and foremost clarify the FCC's jurisdiction and offer it an alternative to Title II. This alone will foreclose years of legal and regulatory uncertainty. Furthermore, legislation should recognize the need for balance in providing the tools needed to ensure the Internet continues to thrive and evolve. Our goal ten years from now should be a better, smarter network than the one we have today—one that supports a rich diversity of applications, not one that delivers all Internet traffic with exactly the same performance.

Uncertainty Under Title II

There are a host of potential problems with regulating the Internet under Title II of the Communications Act, but chief among these is the uncertainty that comes with this approach. Indeed, the title of this hearing today, "The Uncertain Future of the Internet," is apt, for the FCC is about to put several important industries, including firms on both sides of the network, under a cloud of uncertainty, with clarity unlikely for years.

To be sure, the pending Title II approach appears designed to give edge-providers more certainty—a worthy goal. It is important for innovators to know that under no circumstances will they ever have to pay extra for best-efforts Internet access (although they should be able to voluntarily pay for better than best-efforts access or other types of benefits, such as zero-rating plans for customers of their data). But as described below, this is likely to provide only short-term certainty, as there is a real risk that this FCC action will be overturned or significantly modified within the next few years. And of course, Title II, in contrast to legislation, creates considerable uncertainty for network providers.

First, there is the legal uncertainty of Title II classification itself. Several organizations and companies have indicated they will challenge the preliminary step of classifying broadband as a telecommunication service under Title II. In order to survive these challenges, the FCC must, among other things, support a factual finding that broadband no longer "offer[s] the capability for generating, acquiring, storing, [or] transforming . . . information."[2] While the statute is perhaps not the model of clarity, broadband seems like the quintessential technology to offer the capability for acquiring information. My point is not that broadband is an

[2] Definition of "information service," 47 U.S.C § 153 (24).

information service, although it seems to me that it is, but rather that there is legitimate uncertainty as to how such a finding would survive a challenge.

On top of this is the political uncertainty of the controversial Title II. This, frankly, could shift regulations in either direction: a future Republican administration would likely appoint an FCC chair who would work to undue the classification or at minimum to forbear from additional sections, while an future Democratic administration might appoint an even more interventionist chair who seeks to expand into rate regulation, local loop unbundling, mandatory deployment requirements, or other investment-harming measures. The reality is that under an FCC-initiated Title II regime, the scope of regulations placed on one of the most vibrant sectors of our economy becomes unpredictable from one administration to the next. This level of political uncertainty translates into future uncertainty for both edge and core providers. And while no legislation is set in stone—a future Congress can always pass new laws—legislation passed by this Congress addressing net neutrality will provide vastly more certainty for the Internet ecosystem in than tomorrow's FCC vote.

Second, there is significant uncertainty around the forbearance process. Chairman Wheeler has attempted to mollify his critics who assert that a Title II approach will impose significant costs on carriers by claiming that the Commission will simply forebear from the most onerous sets of Title II rules. Forbearance is the process by which the FCC will attempt to not apply those sections of the law that do not apply to broadband networks in the 21st century. Beyond providing explicit recognition that Title II is a kludge of a solution not well suited to the task, the commitment to forbearance brings its own significant risks. The FCC has never attempted this sort of national, industry-wide forbearance, and there is little precedent to

follow. It may be difficult for the Commission to forbear from all portions of Title II, especially those explicitly required by statute like Universal Service contributions. The forbearance process also opens up the door to pressure from a wide variety of interests attempting to craft regulations in their favor. This rent seeking has already begun in earnest, and, with so much of what was settled law now up for debate, will continue for years to come.

One set of groups that will certainly continue to pressure for application of the more onerous utility provisions of Title II are those very advocacy groups who pressured the FCC to invoke Title II in the first place. Indeed, there is good reason to believe advocacy groups such as Free Press and Public Knowledge intentionally coopted the issue of net neutrality into a stalking horse for far broader changes in our nation's heretofore successful Internet policies. Claims to the contrary by those who have long pushed for much more sweeping changes than the formalization of net neutrality norms should not be taken at face value. Indeed, these "public interest" groups have already asserted that Title II can and should be used to impose much more stringent conditions on broadband providers than just complying with net neutrality rules.[3] For these groups, it's net neutrality now, broad-based telephone era regulations next (and for many of them, public ownership of networks after that).[4]

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[3] For example, Public Knowledge has asserted that Title II can and should be used to require broadband providers, including new entrants employing innovative business models to deploy fiber, to serve all areas of community at once. *See* Meredith Whipple, Public Knowledge, "PK Experts Answer Your Burning Questions on Net Neutrality and Title II" (Feb. 13, 2015) *available at* https://www.publicknowledge.org/news-blog/blogs/pk-experts-answer-your-burning-questions.

[4] *See, e.g.*, Candace Clement & Matt Wood, "Why Title II Reclassification for Net Neutrality Is the Biggest Deal Ever," Free Press (Feb. 4, 2015), *available at* http://www.freepress.net/blog/2015/02/04/why-title-ii-reclassification-net-neutrality-biggest-deal-ever (explaining the broad authority beyond net neutrality that comes with Title II, and that "[w]ith Title II we have the legal authority we need to win the battles that are coming around the bend.").

A Balanced Policy for Internet Innovation

What is fundamentally problematic in the current net neutrality debate, especially as presented by most advocates of the currently proposed strong net neutrality provisions is the utter lack of balance. For them there is no balance between edge and core, only the needs of edge providers are considered. There is no balance with regard to network operations: indeed, only strict neutrality is proposed, not a regime that encourages pro-consumer network differentiation while banning or severely limiting the risk of anti-consumer discrimination. And finally, there is no balance with respect to the means to accomplish these first two goals: advocates are willing to employ the sledge-hammer of Title II regardless of the collateral damage it may do to network costs and innovation.

To begin with, any network policy rules should balance innovation in the core of the network as well as innovation at the edge. Net neutrality advocates appear to only appreciate innovation at the edge, and are willing to privilege it even if it means limitations on investment and innovation elsewhere. This is in part a reflection of not only their (mistaken) belief in the "dumb-pipe" premise (the idea that networks should have no intelligence built into them) but their almost religious-like assertion that such pipes always have been, always are, and always should be dumb. As ITIF has demonstrated numerous times, such a reading of the Internet's past, present and future is fundamentally misleading. The Internet is not like the old telephony networks where there was only one application (circuit-switched voice); rather it is a world

where multiple, different applications, each with different network needs, all use the same network.[5]

The light-touch regulatory path that our nation has followed since the Clinton administration has seen tremendous investment and innovation in our communications networks. Continued growth in capacity as well as improvements in stability, reliability, and speed all depend on these investments. Indeed, it is the "virtuous cycle" that drives growth in this area; the two sides of the network derive value from one another. Rules that overwhelming favor "protection" of the edge will ultimately undermine overall progress in the core network if they deter investment and innovation in more capable networks themselves.

Second, we need a balance between net neutrality on the one hand and unfair net discrimination on the other. Because not all Internet traffic has the same characteristics, prioritization or other forms of traffic differentiation can enable innovation in new real-time communication and should be supported, not prohibited. Many of the underlying assumptions behind comments arguing for an inflexible ban on any discrimination whatsoever are mistaken; there are undoubtedly forms of differentiation amongst traffic flows and broadband applications that would be beneficial in overcoming inherent architectural biases built into the Internet.[6]

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[5] *See* Richard Bennett, "Designed for Change: End-to-End Arguments, Internet Innovation, and the Net Neutrality Debate, ITIF (Sept, 2009), *available at* http://www.itif.org/publications/designed-change-end-end-arguments-internet-innovation-and-net-neutrality-debate.

[6] *See, e.g.*, Jeff Hect, "Net Neutrality's Technical Troubles," IEEE Spectrum (Feb., 12, 2015) *available at* http://spectrum.ieee.org/telecom/internet/net-neutralitys-technical-troubles/ (explaining how "the debate has centered on policy, law, and finance, as if the network itself were a given—it is not.").

But as ITIF has long argued and continues to strongly assert, just because some differentiation can be pro-innovation, pro-competition, and pro-consumer, it does not mean that all is. Clearly, there is no place for blocking of legal content in any kind of network policy regime. Nor is there any place for requirements placed by network providers on edge providers for extra payments to obtain best-efforts Internet service (e.g., mandatory toll roads). But just as parts of the Washington, DC beltway allow some drivers to pay more to drive in express lanes (but do not require everyone to do so), so should any network policy be open to possibility of the "next Google" voluntarily choosing to pay for prioritized service to ensure their new application can function even better. Although most applications do not need any kind of prioritization to work effectively, some certainly do.

It is key that any legislation recognizes that the Internet now provides services to many different types of applications. Again, Title II regulations were designed for a network of one application (circuit-switched telephones). A regulatory regime should instead encourage continued growth in Internet applications of all types. It is important that we encourage investment in one interconnected network of networks that supports numerous heterogeneous applications, rather than balkanizing new services into separate, private networks. Rules that go too far in forcing all bits to be treated "equal" would be tantamount to putting all forms of transportation, from bullet trains to bicycles, onto one system for the sake of "fairness."

Many net neutrality advocates argue for "the strongest possible rules" in hopes of a "level playing field." This is misguided. First of all, the Internet is not a "level" playing field today; some companies sink large amounts of capital into extensive content delivery networks, for example. Large companies will always have advantages, whether it is economies of scale or

a larger marketing budget. What we want is not a totally level playing field, but a playing field not tilted one way or the other by government or by actions of network providers. But in contrast to the net neutrality supporters, this level playing field depends on the ability of all market players, including new entrants to be able to buy the kind of Internet access and transport that best serves the needs of their company, not by locking them all into one model. If we aren't careful, overly-restrictive regulation will protect a "level playing field" for only delivery of email and static webpages, and severely hinder the ability for bandwidth intensive, real-time applications to develop.

Furthermore, because wired networks are fundamentally different than wired networks, not the least of which is because they are much more capacity constrained, it means that any network policy regime has to be flexible enough to enable robust wireless innovation with the provision of high-quality services.

Finally, we need balance with regard to network policy tools and regulatory framework. Because so many net neutrality advocates dismiss the importance of network innovation, and indeed view most network operators with a certain level of disdain, there is, in their minds, simply no reason to try to seek balance in the regulatory framework for network policy. If, as is certainly possible if Title II is applied to broadband, a regulatory framework provides a high level of certainty, albeit temporary, regarding limiting harms from network differentiation, but imposes a significant amount of collateral damage on future network progress, that is a price more than worth paying for most advocates. But the FCC and Congress should be more ambitious in their goals, seeking to find the scalpel that cuts out the diseased tissue while preserving the healthy. In other words, while some regulations are needed to give the FCC the

tools to prevent unreasonable conduct, ITIF rejects the premise that the only path is Title II and enacting "the strongest possible rules." Title II, which some point to as the "cure" for net neutrality would almost certainly be worse than the disease, which to date has been quite limited. Indeed, there have only been a handful of examples of even controversial conduct, all of which were resolved through informal processes.

ITIF encourages a balanced, flexible set of guidelines that delineate the types of discrimination that are reasonable and supportive of edge and core innovation from those that are harmful. While we believe the Commission has existing authority for such rules under section 706, a separate grant of authority from Congress could give the FCC the scalpel it needs, rather than the bludgeon that is Title II. And of course, the provision of such a regulatory scalpel by Congress (e.g., network policy legislation) would do wonders to settle surrounding debates and clear what would otherwise be years of uncertainty.

Thankfully Congress can put to rest the long debate over the scope of FCC authority to enact 21st century network policy rules. There is undoubtedly room for compromise on the broad strokes of net neutrality legislation. Everyone is in agreement that we do not want a public Internet where access providers block legal applications or favor their own content over others. An independent grant of authority as an alternative to Title II would do wonders to clarify the issue.

The released Congressional discussion draft is an important start to finding this compromise which, to be effective, will need to be bipartisan. It is encouraging to see the draft bill continue the light touch approach, treating broadband as an information service. The discussion draft also does well in formalizing the widely agreed-upon principles of net

neutrality. Rules against blocking of lawful content, applications, or baseless throttling of lawful traffic, although likely unnecessary due to strong norms against such practices, are unobjectionable. A transparency requirement is likewise generally acknowledged as appropriate.

It is also encouraging to see the discussion draft allow for "reasonable network management." Independent bodies of engineers, such as the Broadband Internet Technical Advisory Group (BITAG), recognize legitimate technical reasons for actions that may, at first glance, to be unreasonable, so it is important to maintain flexibility in this provision as the legislation moves forward.

It is discouraging, however, that the draft bill would outright ban paid prioritization. As explained above, there are certain types of applications that would only be enabled through prioritization. This is a narrow class of real-time applications. In fact, this class is so narrow that there is likely not currently much of a market for prioritization. Paid prioritization should be thought of as allowing for future growth in types of data-intensive applications particularly sensitive to packet loss or delay—not "toll booths" to extract fees. Sure, there is potential for abuse of such arrangements, and regulatory oversight is appropriate. But to ban these services from the public Internet goes too far.

Conclusion

Finding appropriate policies to guide the protection and promotion of the open Internet surely offers opportunity for a bipartisan success story. There is much that is agreed upon and the downside of inaction is potentially severe. A legislative solution that allows for the appropriate balance would do a world of good.

Thank you again for this opportunity to appear today.

Mr. WALDEN. Mr. Atkinson, we appreciate your comments, and thank you for being here today. We will now go to our final witness this morning from the Internet Industry. He is an analyst and an author, Larry Downes. Mr. Downes, we are delighted to have you here as well. Please go ahead.

STATEMENT OF LARRY DOWNES

Mr. DOWNES. Thank you. Thank you, Mr. Chairman, Ranking Member Eshoo, and members of the subcommittee. I appreciate the opportunity to testify before you today. I am based in Silicon Valley, have been for over 20 years, and have been actively engaged in what really is the remarkable development of the broadband Internet ecosystem in several capacities including as an entrepreneur and advisor to start-ups and investors.

Since March 2014 I have also served as a Project Director at the Georgetown Center for Business and Public Policy studying the increasingly uncomfortable tension between the accelerating pace of disruptive innovation and the necessarily deliberative processes of government.

My written testimony focuses on four major concerns with the FCC's pending proceeding which I would like to summarize now. Number one, Chairman Wheeler has flip-flopped from pursuing open Internet rules to what now appears a full-force effort to transform broadband into a public utility, threatens to end nearly 20 years of bipartisan policy favoring light touch regulation of the Internet, perhaps the most successful approach to regulating an emerging technology in history.

Under the visionary approach of Congress, the Clinton administration and FCC Chairman of both parties at the time and since the 1996 Act wisely left Internet governance to the engineering-driven, multi-stakeholder process, a process that continues to rapidly evolve and improve the Internet's architecture protocols and network management technologies.

Number two: The May 2014 NPRM which promised to follow the, quote, roadmap laid out by the Verizon court to reenact the open Internet rules under the authority of Section 706 now appears to have been jettisoned in favor of an all-inclusive plan to regulate every node of the Internet infrastructure including peering, transit, and other essential but non-neutral network management principles the 2010 report and Order wisely and explicitly excluded. Though we have yet to see the final report and Order, it is reported to be over 300 pages long. Its length will challenge even its strongest proponents to say with a straight face that it is any way a simple or light touch resolution to a decade of debate over the appropriate and legally permitted role of the FCC in policing the Internet. And as we know from its 2010 counterpart, most of its most contentious and legally challenged aspects will be intentionally buried deep in the text and in hundreds of footnotes.

The jurisdictional gymnastics were bad enough in 2010. Now, given the acknowledged misfit, both from a legal and policy standpoint of Title II written decades ago to closely regulate the former public switch telephone network monopoly, the process is already confounded by the need to first transform the Internet into a public utility and then immediately begin the process of unraveling that

decision. Having selected the blunt instrument of Title II, the FCC in its discretion must continually decide on its least-appropriate provisions in an attempt to undo them through clumsy and legally uncertain forbearance proceedings. At the very least, extensive forbearance invites the worst kind of rent-seeking behavior by self-interested parties throughout the Internet ecosystem.

Number three: Recent developments in this long-running debate over who and how to regulate the Internet have now made clear that for many advocates that open Internet rules were always the populist tail wagging the shaggy Title II dog. Though the rhetoric of net neutrality remains the substance of the FCC's pending rulemaking instead advances a long-running campaign to abandon the light touch model and replace it with a public utility regime, the goal all along for many supposed open Internet advocates. Though the FCC may today attempt or not to forbear from the most damaging provisions of Title II, the campaign is already preparing to drive the Title II wedge as far as possible which, for the most vocal advocates have always included mandatory unbundling, required build-outs, pre- or post-hoc rate regulation, universal service fees and other taxes, and shared jurisdiction with state public utility commissions. Perhaps the light touch model was wrong all along. Perhaps the transformation of the Internet into a public utility would do a better job of encouraging investment, adoption in innovation. I don't think so, but if that is what we are debating, we should at least acknowledge it and move the debate to Congress where it obviously belongs.

Number four: Abandoning the Verizon court's Section 706 roadmap in favor of public utility regime as the Chairman has not hesitated to acknowledge introduces considerable legal uncertainty that at best will mean another 2 years or more without resolution to the open Internet debate. It is not simply my personal belief that Congress never intended for broadband Internet to be regulated as a public utility like the old telephone network. That of course has long been the interpretation of the 1996 Act of the FCC itself, an interpretation ratified in 2005 by the United States Supreme Court in the Brand X case. Overcoming a decade of FCC policy and Supreme Court precedent will require considerable innovation and outright creativity by government lawyers that will certainly take years to resolve one way or the other.

There is a better way, one that removes all legal uncertainty in an instant and avoids many of the intended and unintended consequences of the public utility gambit. The legislation introduced last month in both the House and the Senate would quickly and cleanly resolve the FCC's persistent jurisdictional problems and enact precisely the rules called for in even the most aggressive articulation of open Internet principles. Though I continue to believe the engineering-driven multi-stakeholder governance of the Internet is the optimal solution, one that has worked with remarkable efficiency since its inception, I have from the beginning supported the proposed legislation if only as a way to end the largely academic debate about the need for what the FCC itself calls, quote, prophylactic rules.

I thank you again for the invitation and look forward to your questions.

[The prepared statement of Mr. Downes follows:]

Hearing on "The Uncertain Future of the Internet"

Before the Subcommittee on Communications and Technology

Committee on Energy and Commerce

U.S. House of Representatives

Written Testimony of Larry Downes[1]

Project Director

Georgetown Center for Business and Public Policy

Feb. 25, 2015

Chairman Walden, Ranking Member Eshoo and members of the Subcommittee, thanl you for the opportunity to testify on the uncertain future of the Internet.

My name is Larry Downes. Based in Silicon Valley for over twenty years, I have beei actively engaged with the remarkable development of the broadband Internet ecosystem ii several capacities, including as an entrepreneur and advisor to start-ups and investors. I am thi author of several books on the information economy, innovation, and the impact of regulation

[1] Larry Downes is Project Director of the Evolution of Regulation and Innovation Project at the Georgetown Center for Business and Public Policy. His books include *Unleashing the Killer App* (Harvard Business School Press, 1998), *The Laws of Disruption* (Basic Books, 2009) and *Big Bang Disruption: Strategy in the Age of Devastating Innovation* (Penguin Portfolio, 2014).

I have also written extensively on the effect of communications regulation on the dynamic broadband ecosystem, and in particular the role played by the FCC.

Since March, 2014, I have served as Project Director of the Evolution of Regulation and Innovation project at the Georgetown Center for Business and Public Policy at the McDonough School of Business, Georgetown University, studying the increasingly uncomfortable tension between the accelerating pace of disruptive innovation and the deliberative processes of regulators.

Summary

- Chairman Wheeler's flip-flop, at the urging of the White House, from pursuing basic Open Internet rules to what now appears a full-force effort to transform broadband into a public utility, threatens to end nearly twenty years of bi-partisan policy favoring "light touch" regulation for the Internet, perhaps the most successful approach to regulating an emerging technology in history.

- The May, 2014 NPRM, which promised to follow the "roadmap" laid out by the *Verizon* court, appears to have been jettisoned in favor of an all-inclusive plan to regulate every aspect of the Internet, including peering, transit and other essential non-neutral network management principles the 2010 FCC Report and Order wisely excluded.

- Recent developments in this long-running debate over who and how to regulate the Internet have now made clear that for many advocates, Open Internet rules were

always the populist tail wagging the less appealing Title II dog. Though the rhetoric of net neutrality remains, the substance of the FCC's pending rulemaking instead completes a long-running effort to abandon the "light touch" model and replace it with a public utility regime—the goal all along for many supposed Open Internet advocates.

- Abandoning the *Verizon* court's "roadmap" in favor of a public utility regime, as the Chairman has not hesitated to acknowledge, introduces considerable legal uncertainty that, at best, will mean another two years or more without resolution to the Open Internet debate. Proposed legislation would quickly and cleanly resolve the FCC's persistent jurisdictional problems and enact precisely the rules called for in President Obama's plan, but only if those rules and not a vast regulatory expansion were the true goal of those calling for a future under full Title II, which the legislation wisely forecloses.

The End of the Bi-Partisan Model of Light-Touch Regulation?

At stake in the FCC's upcoming Open Internet order is nothing less than the unbroken chain of far-sighted decisions by Congress and the FCC, under Democratic and Republican Chairmen, to defer Internet governance largely to the wildly successful engineering-driven multistakeholder process.

That governance model has proven its value to consumers and developers alike, and has

been urged by the U.S. on other governments as a model of regulatory restraint.[2] It has also given the U.S. considerable competitive advantage over most of the rest of the world in securing private investment of over $1 trillion in broadband infrastructure.[3]

Recent and forthcoming interventions by the FCC and the White House have cast Silicon Valley and other technology hubs into considerable—and unnecessary—uncertainty about the future of that model. Nearly twenty years of relative regulatory peace, a dividend of the long-standing bi-partisan commitment to "light touch" oversight of the Internet, is now at extreme risk.

This week, in the name of protecting the Open Internet and its core principles, the FCC is on the brink of following the President's instructions instead to transform it into a public utility, a plan that seems more designed to serve short-term political goals than the long-term health of the most valuable technology platform invented since the Industrial Revolution. These actions threaten the long-term health of and continued investment in the entire Internet ecosystem.

Having spent the last three years working with leading innovation experts on a research project chronicling the next generation of "Big Bang" technology disruptors,[4] most of them originating here in the U.S., I now have significant doubts that the speed and trajectory of those innovations will be maintained as expected.

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[2] Larry Downes, *Why Internet Governance Should be Left to the Engineers*, THE WASHINGTON POST, Sept. 3, 2014, *available at* http://www.washingtonpost.com/blogs/innovations/wp/2014/09/03/why-internet-governance-should-be-left-to-the-engineers/.

[3] U.S. Telecom, *Broadband Investment*, *available at* http://www.ustelecom.org/broadband-industry/broadband-industry-stats/investment.

[4] See Larry Downes and Paul Nunes, *Big Bang Disruption: Strategy in the Age of Devastating Innovation* (Portfolio 2014).

Even if the FCC's upcoming Open Internet Order or the complex forbearance proceedings the Chairman has promised fail to withstand certain legal challenges, the next two years or more of proceedings have the potential to substantially divert investment in both essential broadband infrastructure and new services built on top of it.

My testimony highlights some of the most worrisome aspects of these recent developments.

The ***Verizon*** Court's "Invitation" Goes Unanswered

Though we will not see the FCC's upcoming Report and Order on the Open Internet rulemaking until after the Commission votes on Feb. 26th, 2015, written comments of Chairman Wheeler and others who have seen the document make clear that the proceeding now has little to do with the Chairman's promise in early 2014 to simply follow "the roadmap laid out by the D.C. Circuit."[5] In rejecting much of the FCC's 2010 rulemaking on jurisdictional grounds, the majority in the *Verizon* case indicated that the FCC could prevail on remand, provided it grounded its rulemaking on Section 706 of the Act. Chairman Wheeler eagerly agreed to accept the court's "invitation" to try again.

But the Section 706 approach has, at the urging of the White House, apparently been abandoned. In undertaking a third effort to pass enforceable rules to protect the Open Internet from future anti-consumer and anti-competitive network management practices, the agency now seems poised to undertake the much larger and much more dangerous project of

[5] Statement of Chairman Tom Wheeler, Re: *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, May 15, 2014, *available at* http://www.fcc.gov/article/fcc-14-61a2; *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

transforming broadband Internet into a public utility—perhaps the true goal of Open Internet advocates all along.[6]

The Chairman performed an abrupt about-face, and now proposes to adopt what the White House has itself referred to repeatedly as "President Obama's plan."[7] Announced in November, 2014, the President's plan reflects a radical change in policy, sharing little with the relatively straightforward rulemaking announced by the FCC in May. In particular, the President's plan explicitly calls for the FCC to subject the Internet to public utility regulations, specifically those originally designed to control the former monopoly telephone system.[8]

President Obama's plan, which Chairman Wheeler indicated in early January he intended to adopt instead of his own proposed rulemaking, will attempt the legal equivalent of a Hail Mary pass. Broadband Internet access has always been understood by the FCC to constitute an "information service" subject to light-touch regulation under Title I of the Communications Act. To transform it into a public utility, the FCC has long believed it must "reclassify" broadband as a telephone service before subjecting it to some as yet indeterminate subset of Title II of the Communications Act, which has for decades regulated the increasingly diminishing public switched telephone network (PSTN) as a "telecommunications service."

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[6] "Fact Sheet: Chairman Wheeler Proposes New Rules for Protecting the Open Internet," *available at* http://www.fcc.gov/document/chairman-wheeler-proposes-new-rules-protecting-open-internet.

[7] "Net Neutrality: President Obama's Plan for a Free and Open Internet," THE WHITE HOUSE, Nov, 10, 2014, *available at* www.whitehouse.gov/net-neutrality. Beyond the very title of the announcement, the White House refers repeatedly to the President's "plan," e.g. "That's why the President has laid out a plan to do it, and is asking the FCC to implement it;" "Watch President Obama explain his plan, then read his statement and forward it on;" "Share the President's Plan."

[8] President Obama's plan explicitly embraces the transformation of broadband into a public utility, one that "must carry the same obligations as so many of the other vital services do." *Id.*

The Chairman has also indicated his implementation of the President Obama's plan will go far beyond simply using Title II as a jurisdictional lever to introduce last-mile prohibitions on throttling, paid prioritization and blocking. As Chairman Wheeler noted in his recent "Fact Sheet," the rulemaking will now, "for the first time" grant the FCC oversight of potentially every link in the connections between networks that make up the Internet's unique, engineering-driven architecture.[9]

Yet before the White House's intervention, Chairman Wheeler himself acknowledged that policing interconnection and network optimization technologies had nothing to do with the Open Internet, stating repeatedly earlier in 2014 that peering and interconnection "is not a net neutrality issue."[10]

Depending on how interconnection rules are drafted and enforced, everything from Internet backbone services to peering, transit, co-located servers and content delivery network—and other network management technologies that help balance an explosion of video traffic--could soon become subject to FCC oversight and intervention. Disappointed parties will no doubt choose to invoke the agency's new self-granted authority rather than continuing to rely on market negotiations.

Connections before the last mile—that is, behind the connection between ISPs and consumers--were explicitly and wisely exempted from the 2010 rulemaking on both legal and

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[9] See "Fact Sheet." ("For the first time the Commission would have authority to hear complaints and take appropriate enforcement action if necessary, if it determines the interconnection activities of ISPs are not just and reasonable, thus allowing it to address issues that may arise in the exchange of traffic between mass-market broadband providers and edge providers.")

[10] Larry Downes, *How Wheeler's 'Net Neutrality' Became Obama's 'Public Utility,'* FORBES, Feb. 12, 2015, *available at* http://www.forbes.com/sites/larrydownes/2015/02/12/how-wheelers-net-neutrality-became-obamas-public-utility/print/. (Attached as Appendix I)s

technical grounds. That was true despite the fact that the FCC acknowledged, also correctly, that such arrangements belie the naïve view of some legal academics that Internet traffic management is or ever has been in any engineering sense "neutral."[11]

According to the OECD, over 99% of all such arrangements are so uncontroversial that they are not even reduced to writing.[12] They are based on technologies and protocols that are rapidly evolving, in a perpetual arms race with new forms of content and new services that can take off suddenly when consumers embrace them all at once, a phenomenon of Big Bang Disruption that my co-author and I refer to as "catastrophic success."[13]

The only thing that has changed since 2010 has been that ISPs and content providers, especially those serving video traffic and especially on spectrum-constrained mobile networks, have become even more dependent on active network management technologies. Far from making the case for FCC oversight and regulation of such agreements, the opposite is true. The smooth operation of the commercial Internet relies on quick decision making, new arrangements, and regular experimentation.[14]

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[11] Larry Downes, *Unscrambling the FCC's Net Neutrality Order: Preserving the Open Internet, but Which One?*, 20 COMMLAW CONSPECTUS 83 (2011). The 2010 Report and Order identified, by my count, over a dozen practices the agency concluded were both "non-neutral" yet essential to the continued operation of the network.

[12] Rudolf Van Der Berg, *Internet Exchange Traffic: Two Billion Users and it's Done on a Handshake*, OECD, Oct. 22, 2012, *available at* http://oecdinsights.org/2012/10/22/internet-traffic-exchange-2-billion-users-and-its-done-on-a-handshake/.

[13] *See Big Bang Disruption*, Chapter 4.

[14] Advocates argue that the very public complaints from Netflix that leading ISPs were intentionally slowing delivery of Netflix content to the ISPs' customers in early 2014 in order to induce the company to upgrade its delivery technology, justifies a more interventionist FCC. (During peak hours, Netflix consumes over a third of all Internet capacity, and uses a variety of mechanisms to get its traffic onto the network, including its own proprietary content delivery networks placed at strategic points in ISP networks.) In fact it was later discovered that the slow-down of Netflix traffic was based entirely on a decision made by Cogent, one of the companies Netflix had contracted for bulk transit of traffic. When Cogent became unable to deliver all of the traffic for its customers, the company elected to de-prioritize the traffic of its wholesale customers, including Netflix. Once the truth was revealed, Cogent admitted to the decision, but Netflix never withdrew its claims that it was the ISPs who

Open Internet Rules Remain the Tail Wagging the Public Utility Dog

Whatever versions of the rules has been discussed in the last decade, their prohibitions of certain network management practices deemed harmful to the Open Internet has always been, to use the FCC's own wording, "prophylactic" in nature.[15] To the extent that Internet traffic management follows open principles, it has always done so without the existence of enforceable rules by any regulator other than the multistakeholder engineering-driven groups that manage network protocols.

What is true, however, is that though no two advocates ever agree on precisely what is meant by key terms, including the nebulous and non-engineering legal concept of "net neutrality," in substance most versions of the rules, including those likely to be included in the FCC's upcoming order, were never the true source of controversy. They prohibit business arrangements and network management behaviors that the agency acknowledges are not found in practice, and which leading ISPs have disavowed interest in or are already prohibited from pursuing under the terms of transaction consent decrees and conditions and spectrum licenses.[16]

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had instituted the slowdown rather than its own business partner. *See* Larry Downes, *How Netflix Poisoned the Net Neutrality Debate*, FORBES, Nov. 25, 2014, *available at* http://www.forbes.com/sites/larrydownes/2014/11/25/how-netflix-poisoned-the-net-neutrality-debate/ (Attached as Appendix II).

[15] Report and Order, *In the Matter of Preserving the Open Internet*, GN Docket No. 09-191, Dec. 21, 2010, *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A1.pdf. The Report described the 2010 rules as "prophylactic" over a dozen times. *See also* Downes, *Unscrambling the FCC's Net Neutrality Order*.

[16] For example, AT&T, even at the time of the 2010 Order, disclaimed any interest in last-mile paid prioritization. Comcast is bound to a stricter version of Open Internet rules than those rejected by the *Verizon* court under the terms of its merger with NBC Universal. And Verizon is subject to Open Internet requirements on its LTE network under conditions placed at the behest of Google on the 700 MHz "C" block auction.

Indeed, depending on the interpretation of terms including blocking, discrimination, and throttling, and the implementation of theoretical last-mile paid prioritization, the practices the White House and its colleagues worry about for the future are almost certainly prohibited by longstanding anti-trust and anti-competition law, law that is aggressively enforced by the Federal Trade Commission specifically in the Internet ecosystem.[17]

The real problem with—and the principle objection to—having those rules be made enforceable exclusively by the FCC has and remains the agency's lack of statutory authority to do so. Since 1996, it has been the bi-partisan policy of Congress, the White House and the FCC to respect the visionary "light touch" approach to broadband regulation codified in the statute.

Self-styled consumer advocates and some content providers, however, have since the beginning of the commercial Internet sincerely believed instead that the U.S. would be better off regulating broadband following both the model and the rulebook developed for the former monopoly Public Switched Telephone Network, embodied in Title II and associated state and federal regulations regarding tariffs, taxes, service and infrastructure. For these groups, the Open Internet rules have always been a rhetorically appealing sound bite in support of the true goal-- the transformation of broadband into a public utility.

With the President's November statement, the White House has explicitly embraced that view. The FCC is now poised to follow the White House's lead, acceding to the President's urging.

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[17] But not if the FCC succeeds in "reclassifying" broadband. Title II explicitly forecloses enforcement by the FTC of anti-competition laws for common carriers regulated under Title II. Implementation of the President's plan thus seems certain to end a long and aggressive enforcement of competition law by the FTC against ISPs in favor of complete authority for the FCC alone but without access to much of the FTC's legal toolkit. *See* Association of National Advertisers, "How Will Net Neutrality Rules Impact Advertisers?" *available at* http://www.ana.net/blogs/show/id/33695.

While I strongly disagree with the view that transforming broadband Internet into a public utility will in any manner improve adoption, pricing, innovation or any other consumer value, one thing is no longer in doubt. It should now be clear to consumers being dragged into this debate that for many of the participants, the goal has never been passage of enforceable Open Internet rules at all, but rather the reversal of the light-touch model for broadband in favor of a public utility regime.

That reality is underscored by the deafening silence thus far from Open Internet advocates in response to legislation circulated in January, both in the House by this Committee and by its Senate counterpart.[18]

That legislation would at long last resolve the FCC's lack of jurisdiction over broadband without reliance on any legal legerdemain. It would explicitly enact every one of the network management prohibitions called for in President Obama's plan. It would go far beyond the 2010 Order rejected by the *Verizon* court, the 2005 principles rejected by the *Comcast* court, and the Chairman's own May, 2014 NPRM. It explicitly prohibits "paid prioritization," "throttling" and blocking, for example, and treats mobile broadband under the same set of rules as wired access.

The only thing the draft legislation would not enact from President Obama's plan is the transformation of broadband into a public utility. Instead, it removes any doubt left by multiple court decisions and twenty years of bi-partisan policymaking that Title II was ever intended to cover broadband Internet access.

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[18] Larry Downes, *Eight Reasons to Support Congress's Net Neutrality Bill*, The Washington Post, Jan. 20, 2015, *available at* http://www.washingtonpost.com/blogs/innovations/wp/2015/01/20/eight-reasons-to-support-congresss-net-neutrality-bill/.

The proposed legislation gives the Open Internet advocates precisely what they have asked for, in other words, but removes the dangling sword of Title II hanging precipitously over the head of the Internet.

On that basis, the draft legislation has been rejected outright by pro-public utility advocates as a basis for resolving a decade-old issue, even though its passage would secure the goals they claim to have been pursuing without further legal, technical and economic uncertainty.

So it is Title II and not the Open Internet or "net neutrality," it seems, that has and remains the actual goal of this long-running campaign.

If anything positive comes from this latest set of missteps at the FCC and the certain legal challenges to follow, my hope is that it will lead at last to an honest debate on the merits of the topic that has intentionally been hidden in the background: the appropriateness of public utility regulation for the Internet.

Congress can then weigh the pros and cons of applying the model created for monopoly power, water, and PSTN telephone companies to the unique characteristics of the Internet. Perhaps once consumers understand what is really being urged in their name, they will honestly and sincerely support the idea of transforming broadband into a public utility. Perhaps, reflecting on the level of investment, innovation, and maintenance demonstrated by existing utilities, they will think otherwise. But in any case they should at least be told plainly what it is they are actually being urged to advocate for.

Choosing Legal Uncertainty

Beyond uncertainties about what precisely is in the Chairman's implementation of President Obama's plan and how the FCC will or will not try to use forbearance to limit the damage of a public utility regime on mobile and wired broadband Internet, the uncertainty that most concerns responsible participants in the Internet ecosystem is, of course, the legal uncertainty. As the Chairman was quick to point out before the White House's intervention, any effort to "reclassify" broadband as a public utility will without doubt be met with legal challenges whose scope and obstacles will dwarf those faced by the agency in its unsuccessful defense of two previous efforts to create enforceable Open Internet rules.

There are at least three major legal obstacles to force-fitting Title II onto broadband. Resolving these in the courts will likely engage multiple proceedings taking two years or longer. I discuss each of them briefly below:

1. Overcoming ***Brand X*** and FCC precedent – In the *Brand X* case,[19] the U.S. Supreme Court acknowledged ambiguity in Congress's definitions of "information service" and "telecommunications service." But the Court has never held that Congress intended for the FCC to have discretion to *define* those terms, only to interpret Congress's intent--interpretation subject to the *Chevron* standard of deference. The FCC gave a reasoned explanation for its view that Congress intended broadband Internet to be governed as an information service subject to Title I and not Title II, and the Court held that interpretation was not unreasonable.

[19] *National Cable and Telecommunications Association v. Brand X Internet*, 545 U.S. 967 (2005).

In litigation involving any attempt to "reclassify" broadband as a Title II telecommunications service, the agency cannot simply announce it has changed its mind about what Congress intended in 1996. Making the case that changed circumstances have somehow changed the nature of broadband in the interim will also be difficult, especially when all of the evidence, including the lack of Open Internet violations documented in the exhaustive 2010 proceeding, makes clear that the statutory intent of light-touch regulation has worked so well.

2. Forbearance – There is a great deal of uncertainty regarding which provisions of Title II the FCC initially intends to forbear from, and the process by which it will attempt (or not) to sustain those decisions in successive legal challenges. In Chairman Wheeler's announcement in early January of his decision to implement the President's plan rather than his own, the Chairman assured attendees at the Consumer Electronics Show he could achieve the President's public utility goal with only the three "core" provisions of Title II – Sections 201, 202 and 208.

These, of course, are the provisions that taken together form the basis for public utility treatment of telecommunications services, so relying "only" on these sections is cold comfort to those who fear the application of Title II as a means to enact enforceable Open Internet rules will quickly lead to expanded regulation of the Internet as a whole, including oversight (pre or post facto) of fees, services, and taxes.

Considerable cause for concern comes from the fact that the Chairman has already backtracked from these self-imposed limits. By the time the Chairman released

his "Fact Sheet" a few weeks later, that list had ballooned to twelve provisions, including "partial application" of Universal Service to broadband, and several added enforcement provisions, along with rules regulating the attachment of broadband equipment to existing utility poles and conduits under terms and conditions approved by regulators.[20]

Even in that expanded list, the Chairman was disturbingly vague about how forbearance from tariffing, taxes, Universal Service and interconnection would actually achieve the cabined Title II jurisdiction he claimed to be designing in his effort to "modernize" Title II.

3. Jurisdiction over mobile broadband – While Chairman Wheeler is correct in frequently repeating that mobile voice services, under Section 332, have long been subject to a limited subset of Title II provisions, he conveniently leaves out the corollary that mobile broadband—the only aspect of the mobile Internet, increasingly, that matters—is explicitly *excluded* from Title II.[21]

   Even if the FCC can convince the courts to approve its Title II gambit for wired Internet access, I see no path to making a similar case for mobile broadband.

I appreciate the opportunity to testify, and look forward to your questions.

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[20] *See* "Fact Sheet;" Larry Downes, "How Wheeler's 'Net Neutrality' Became Obama's 'Public Utility.'" (Attached as Appendix I)

[21] 47 U.S.C. §332. See *Cellco P'Ship v. FCC*, 700 F.3d 534, 544 (D.C. Cir. 2012) (Section 332 presents a "statutory exclusion of mobile-internet providers from common carrier status."); see also *Verizon*, 740 F.3d at 650 ("treatment of mobile broadband providers as common carriers would violate section 332").

[The attachments to Mr. Downes' testimony have been retained in committee files and can be found at *http://docs.house.gov/meetings/if/if16/20150225/103018/hhrg-114-if16-wstate-downesl-20150225.pdf.*]

Mr. WALDEN. Mr. Downes, thank you, and thanks to all of our witnesses for testifying today. We appreciate your comments, your suggestions, and your concerns. I would like to ask unanimous consent to submit into the record an opinion piece written by Robert McDowell, former FCC Commissioner, and Gordon Goldstein that was in the Wall Street Journal entitled, Dictators Love the FCC's Plan to Regulate the Internet; the Obama Administration's Efforts to Treat the Web Like a Utility has Fans from Saudi Arabia to the Putin's Kremlin. Without objection.

[The information has been retained in committee files and can be found at *http://docs.house.gov/meetings/if/if16/20150225/103018/hhrg-114-if16-20150225-sd009.pdf.*]

Ms. ESHOO. Oh, my God. Come on.

Mr. WALDEN. Well, I don't generally comment on the submissions you have. So Mr. Downes, the United States recently returned from a treaty conference in South Korea where our delegation fought to keep the Internet from coming under the purview of the UN's International Telecommunications Union. The ITU has an extensive set of regulations that apply to telecommunications including economic relations on interconnection. Would the FCC redefine a broadband Internet as a public utility telecommunications service within the ITU constitutional remand? And with the FCC stating that its regulatory powers would include Internet interconnection agreements, have the implications for international termination agreements been considered by the Commission and what effect do you think this will have?

Mr. DOWNES. Thank you, Mr. Chairman. So of course, again, we have to qualify that we have not seen the full report. We don't know exactly how they are going to do this, but certainly if we are talking about a telecommunications service, that is within the purview of the ITU and the treaties that the United States is subject to in conjunction with its membership in the ITU.

Whether or not this is going to stand up legally, I think there is no question that these forces within the ITU that are eager to introduce things like sending network pays, models that we have had on telephone service and introduce that for Internet service is a way of subsidizing their own local broadband connections. They will certainly make the argument, whether they are successful or not, that our move undermines our longstanding commitment to keeping the Internet away from those kinds of telecommunications and settlement regimes, and really, it certainly undermines our moral high ground in saying so whether or not they get away with it or not.

Mr. WALDEN. Under GATS, countries that declare services to be basic services like telephony could limit U.S. investment opportunities abroad. Up until now the USTR has argued that Internet broadband is a value-added service, and importantly in many country trade commitments, there are more liberal market access opportunities for value-added services as compared to basic services.

For example, China has more restrictive rules for who can obtain a basic service license, and China has defined services connected to the Internet to be basic services, a definition that the U.S. trade representative has challenged in the past.

Taking this as an example, could the FCC reclassification to a telecommunications utility as they are doing allegedly under their rule change USTR negotiating positions abroad and result in closing market access and competition opportunities for U.S. companies?

Mr. DOWNES. So I don't feel comfortable sort of answering the question in terms of what it would force the USTR to do, but certainly as I say, from a rhetorical standpoint, it makes our negotiating position, our leverage, much more subject to those kinds of arguments coming from the countries we have been urging so strongly over the years to try to keep Internet as a light touch regulatory model the way we have historically done.

Mr. WALDEN. All right. Mr. Atkinson, you raised some issues involving Mr. Kimmelman's organization. I would like to hear you pursue that a bit and then get Mr. Kimmelman's reaction as well. What else do you see out there in terms of what the FCC is proposing in their Open Internet Order?

Mr. ATKINSON. Well, again, we haven't seen it, but I would agree with Mr. Downes that the net neutrality argument for some groups, not all groups, and I don't really believe this is true for most of the industry advocates, for example, in Silicon Valley, but the net neutrality argument in my view has been a stocking horse for going back to a network that is highly regulated and ultimately going to a network that is publically owned. I think that is the end goal for many, many of these organizations. They want cities or governments to be running these networks, and they equate them to roads which most roads are publically operated and publically funded, not all. And so I think what we will see—and I didn't mean to just point out Public Knowledge alone because there are other groups that do that, but I noticed it last week when I was on their Web site. It was pretty stark. It was essentially saying that they would use the Title II power to require broadband providers to roll out broadband in a certain way. Now, if you do that, I think what the end rules of that will be will be much less competition because it is harder for new entrants to come into a market and put a little bit of broadband here. They may not have the capital. They may not have the markets right away. But if you are requiring them to serve an entire area from the day one, you will simply get fewer competitors coming into the wireline marketplace, and I think that is going to end up hurting.

So I think we will see more and more of that as—my prediction is if Title II decision is made tomorrow, you will see sort of a period of quiet for maybe 3 or 4 months, and then you will start seeing this next sort of wave. Well, we have done that for net neutrality but what about this? What about prices? What about discrimination?

So I think it is just really the first step that we are going to be seeing here.

Mr. WALDEN. I appreciate that. Mr. Kimmelman?

Mr. KIMMELMAN. Thank you. I think Mr. Atkinson has fundamentally misunderstood what was a Q&A session that was reported on our Web site. It was a response to the question about is there a concern for red-lining as broadband is built out, denying service to low-income marginalized communities? And our staff indicated that there was a concern. We didn't call for regulating everyone.

Mr. WALDEN. All right.

Mr. KIMMELMAN. And I think as Mr. Atkinson knows, we have supported differing treatment of dominant and non-dominant carriers for years and years and years. Everyone knows as competition grows, you need to let start-ups get into a market and challenge the dominant players.

So I think that is just a misunderstanding.

Mr. WALDEN. All right. Mr. Atkinson, anything else? Five seconds.

Mr. ATKINSON. Well, I would be happy to submit to the committee the actual statement that a Public Knowledge employee researcher——

Mr. WALDEN. All right.

Mr. ATKINSON [continuing]. Puts on there, and it is very clear that they intend to use Title II for this purpose.

Mr. WALDEN. All right. My time is expired. I recognize my friend from California, Ms. Eshoo.

Ms. ESHOO. Thank you, Mr. Chairman, and thank you to all the witnesses.

First on the issue of equating the open Internet rules with repressive government attempts at online censorship I really think is misinformed and irresponsible. Several of the governments seeking to expand the UN and ITU role in Internet governance are actively engaged in blocking their citizens' access to information online. And that is very important to have down in the record. This is the opposite of U.S. policy. This is not U.S. policy. It is the stark opposite of it.

We adopted the open Internet rules to protect consumers' access to the content of their choosing. That is one of the basic tenants of an open Internet. So I think it is important to get that down for the record.

I have several questions. I doubt that I am going to be able to ask all of them. I ask that you keep your answers brief. Mr. Downes, you are really lathered up about this. Last week T–Mobile—this is on the issue of investment and this whole notion, wild accusations that the market is going to be chilled, there isn't going to be any investment. Last week T–Mobile became the second major wireless carrier to downplay the implications of Title II on their ability to continue investing. So how do you reconcile T–Mobile's statements and similar comments by Sprint with your belief that the FCC action will threaten the long-term health and continued investment in broadband?

Mr. DOWNES. OK. Thank you, Ms. Eshoo. I can't obviously comment on what T–Mobile and Sprint are thinking and their reasoning, but what I can say is, you know, under this light touch bipartisan policy we have had the last 20 years, we have had over a trillion dollars of investment in broadband——

Ms. ESHOO. No, but I am asking you, the charge is, and it has been made by those that oppose essentially my position and those like-minded individuals and organizations, it is a very serious charge that has been made. So can you reconcile it? Do you have proof? Is there lack of investment? Is there already a chill? Do you have information from the New York Stock Exchange or others? I think it is one thing to say we are concerned about something. It is another thing to make a charge that, A, is definitely going to happen and is going to produce B.

So let me move on to Rob Atkinson. Thank you. Good friends. I am an Honorary Co-Chair of ITIF and proud to be. In the absence of robust broadband competition, I think there is an even greater need for strong enforceable open Internet rules. Now, your testimony doesn't raise this issue, but the facts I think point to rather dismal picture. At speeds of 25 MB per second, nearly half of Americans have just one choice. At slower broadband of 10 MB per second, 30 percent of all Americans still have only one choice.

So what would you propose be done to enhance broadband competition? And just be as brief as possible. If you have like maybe three bullet points?

Mr. ATKINSON. Well, first of all, as we have written on that, no country in the world has a majority of its connections over 25 MB, even North Korea certainly doesn't. Even South Korea.

Ms. ESHOO. Yes, but we are talking about the United States of America. So I am asking——

Mr. ATKINSON. Right, but my point is that——

Ms. ESHOO [continuing]. You a very direct question.

Mr. ATKINSON. Congresswoman, my point on that is simply 25 MB I think is a standard that is just too high. No country meets it. So we do have robust competition, more around the 10 to 15 MB range where we have a lot of providers competing.

But I would agree with you. I don't think competition—you could have more competition or less competition. I would fully agree. It doesn't mean that we shouldn't have rules because even with competition, you can have abuse. So I agree with you we need rules.

Ms. ESHOO. OK. I am going to ask you to stop so I can get to our friend, Rick Boucher. And it is wonderful to see you, and thank you for being here today.

Eight years ago you introduced the Community Broadband Act of 2007, yourself and then-Representative Upton, as a way to overturn state bans on municipality-built broadband networks to spur deployment. Would you still stand with that today?

Mr. BOUCHER. My views have not changed, Congresswoman Eshoo.

Ms. ESHOO. Good.

Mr. BOUCHER. I believed then and believe today that where the incumbent providers are not offering an adequate service and in many places their service is either quite slow or in some very rural communities and reaches of the community is non-existent. If a community wants to step up and provide a broadband service that enhances economic development, then it ought to be free to do so.

I would just note that in one community in my formal congressional district, the City of Bristol, the public utility there that is city owned overbuilt the incumbent provider and offers a gigabit-

level network that has been tied directly to the creation of more than 1,000 jobs in that community.

So yes, I think it makes a lot of sense. I indicated that my testimony here today is entirely my own views, and you have asked for my view and I can assure you that my view has not changed.

Ms. ESHOO. Well, that is wonderful, and I hope that the FCC Chairman's proposal includes what you began many years ago. Thank you. I think my time has more than expired.

Mr. WALDEN. The gentlelady yields back. The chair now recognizes the gentlelady from Tennessee, the Vice Chair of the Full Committee, Ms. Blackburn, for 5 minutes.

Mrs. BLACKBURN. Thank you, Mr. Chairman, and thank you to each of you for your time to be here. Our constituents are really concerned about this issue. As I said in my opening remarks, they don't think the Internet is broken and they don't understand why the FCC would be trying to step in. So we appreciate hearing from you.

Another thing that I hear and I want to take my questions this direction is the issue of new fees and taxes. I know Progressive Policy Institute had a study, and they said maybe $11 billion in new fees and taxes. And then January 16 the Washington Post ran a story attacking that figure, but then they noted that through interviews with tax and regulation experts that Title II reclassification would likely, and I am quoting, "cost some consumers something." And we know that Chairman Wheeler is, as Mr. Atkinson, you pointed out, there has been discussion about forbearance from applying universal service fees on broadband and other components. So we do have concern about this in the reclassification, that it will lead to some amount of increased fees and taxes. And February 2 the New York Times ran a piece titled In Net Neutrality Push, the FCC is Expected to Propose Regulating Internet Service as a Utility. And in that piece, David Farber, Professor Farber from Carnegie Mellon, and I think all of you probably are familiar with him. He helped to design parts of the backbone of the Internet. And as we say in Tennessee, it was not done by Al Gore. It was done by others. But the article states Professor Farber commented, "Regulating the Internet like a telecom service potentially opens up a Pandora's Box."

And he advised that information services are typically free of taxes while telecommunications services are not especially at the state level.

So what I want to ask you all, looking at these components, from Progressive Policy Institute, the review of that by the Post, the comments as in the New York Times by Professor Farber, does anyone on the panel dispute the conclusions of Dr. Farber, the Progressive Policy Institute, and the Washington Post? Mr. Kimmelman? Go ahead.

Mr. KIMMELMAN. Ms. Blackburn, I certainly dispute the implications of that is being said. What is being said is if there will be new taxes and fees. My understanding is the chairman's proposal will have no new federal taxes and fees. He is forbearing from a portion of Section 254 as I understand it from his own description of what he will propose tomorrow. So there will be no federal taxes and fees.

As to state and local government, which I believe is what Dave Farber was also referring to, it is today the case that every state can decide on its own what it wants to tax, what it wants to impose fees on, subject to limitations that this Congress is and has imposed on the Internet tax moratorium legislation which you can adjust as need be to make sure that state and local governments do not go beyond what you think is reasonable.

Mrs. BLACKBURN. OK. So Mr. Kimmelman, you are disagreeing with the conclusions of Dr. Farber? You disagree with him as one of the architects of the Internet?

Mr. KIMMELMAN. I don't believe he is the architect of tax systems. I believe that is your job here and what state governments do, and he presented——

Mrs. BLACKBURN. OK. So you are——

Mr. KIMMELMAN [continuing]. A point of view of what he thinks might happen somewhere and——

Mrs. BLACKBURN. OK. I am going to interrupt you again——

Mr. KIMMELMAN [continuing]. That is plausible but it is not a statement of fact.

Mrs. BLACKBURN [continuing]. So we can continue on this. So let me ask you this. How much do you anticipate it is going to cost consumers and private industry, especially if USF funds are eventually applied to Internet access? And most people agree, even Free Press, that reclassification would lead to some net increase in taxes and fees of about $4 billion. So what do you really think?

Mr. KIMMELMAN. I am hopeful, Ms. Blackburn, that the FCC will review its universal service rules, will do something about the approximately 10 percent, way-too-inflated fee that all of us are paying——

Mrs. BLACKBURN. OK.

Mr. KIMMELMAN [continuing]. On our telephone bills and figure out a better system where we actually all pay less. I believe——

Mrs. BLACKBURN. Mr. Kimmelman——

Mr. KIMMELMAN [continuing]. That is certainly plausible.

Mrs. BLACKBURN [continuing]. Let me ask you this in my few seconds that remain. Were you or your organization, Public Knowledge, privy to any of the closed-door sessions at the White House where there was a discussion on what the net neutrality order would look like coming from the FCC?

Mr. KIMMELMAN. No. No, Ms. Blackburn. We were not privy to any——

Mrs. BLACKBURN. Have you seen draft language?

Mr. KIMMELMAN. No, I have not.

Mrs. BLACKBURN. Yield back.

Mr. WALDEN. The gentlelady yields back, and I now recognize Mr. Pallone.

Mr. PALLONE. Thank you, Mr. Chairman. As I said just a few weeks ago at the subcommittee's other open Internet hearing, one of the important aspects of net neutrality is ensuring that the FCC stands ready to protect consumer privacy, whether with regard to consumers needing telephone access or consumers needing broadband Internet access. Yet yesterday Administrator Strickland confirmed to me that the White House intends to release as early as this week its Consumer Privacy Bill of Rights proposal which

could effectively strip the FCC of its ability to regulate consumer privacy. The administration has not shared the proposal with members of this committee but has shown it to industry. As confirmed yesterday under the current draft which I am hopeful can be modified before release, telephone, Internet or cable companies can get out of FCC privacy oversight by creating a self-regulatory privacy code of conduct through a multi-stakeholder process. Specifically, these companies would no longer be covered by Section 222, the privacy section of Title II or other similar provisions.

So Mr. Kimmelman, I wanted to ask you. There are several concerns with the current draft privacy bill from the White House from basing it on a tried and failed multi-stakeholder process to potentially weakening FTC's current authorities. However, can you please comment on the concept of allowing telephone, Internet, and other providers being relieved of their obligations under Section 222?

Mr. KIMMELMAN. Thank you, Mr. Pallone, and I appreciate your strong concerns about this. I certainly hope what you have heard is not accurate. I think this could be an enormous problem for consumers who have relied on the ability to protect their own personal privacy on telephone calls and their own viewing habits over cable television. That has been what Section 222 of the Communications Act has been applied to most generally. I certainly hope the administration is not considering rolling that back.

Mr. PALLONE. Can I ask you, I don't know if you wanted to respond to anything else that members have brought up so far if you haven't had the opportunity and wanted to comment further?

Mr. KIMMELMAN. I would like to say something about the ITU having spent a bit of time at the WCIT Conference where Rob McDowell was as well. I think there is a little bit of a misunderstanding or sleight of hand here of raising telecom utility as a definition which I do not believe is what, based on what I have seen of the statements of the Chairman of the FCC, he is proposing to do with his Open Internet Order and drawing things into some broader regulatory framework at the ITU. I just don't believe that is on the table.

On the contrary, I believe from the description that has been provided of the proposed plan, it is the actual effectuation of the U.S. Government's position against Russia and China and Iran and other repressive regimes that we not only ask other governments to prevent censorship and interference with their citizens' communications but we ourselves practice that and do not censor citizens' communications on the open Internet and do not allow corporate gatekeepers to do the same.

So I view it as quite consistent with our past policies.

Mr. PALLONE. I thank you. Mr. Chairman, I just wanted to say I know—and Ms. Eshoo and I were talking about this earlier. The Republicans keep talking about court challenges, and the fact of the matter is that anything can be tied up in a court challenge. And you know, there was a time when the Republicans tried to avoid litigation. I specifically remember, they have and continue to talk about tort reform in the healthcare sector. But now it looks like the GOP wants to sue on everything, you know? They sue on the ACA. They sue on immigration reform. I am just commenting

on the fact that I really don't quite understand why, we as a subcommittee or as a committee have to be constantly worried about who is going to sue who because we never know who is going to sue no matter what the action is by FCC or any other agency.

So I just, a comment on the fact that I really don't think that we should be deciding what to do here, based on who we think is going to sue who. And certainly I see that if anything, it is the Republicans that appear to be more litigious these days than our side of the aisle.

I yield back.

Mr. WALDEN. The gentleman yields back the balance of his time. Chair now recognizes the former chairman of the committee, Mr. Barton, for 5 minutes.

Mr. BARTON. Thank you, Mr. Chairman. And we are delighted to have the Honorable Boucher here. It is a level of the respect and the amount of intimidation factor that you have not yet been asked a question. We are afraid of you, Mr. Boucher. But I remember well the debates you and I have had, some on the same side, some on opposite sides. And we are delighted that you are here again. We love Morgan Griffith. He is a great member of this committee, but we miss you and we wish you well.

Mr. BOUCHER. Thank you very much, Mr. Barton.

Mr. BARTON. We have talked about this issue of net neutrality, and Mr. Atkinson quite rightly pointed out that that is a misnomer. Net neutrality as espoused by the most aggressive proponents, there is nothing neutral about it. It is net regulation. What the FCC is probably going to vote on tomorrow is net nonsense. It is not going to work. It is going to be tested in court. It is going to fail in court. The chairman of this subcommittee and the Full Committee have put out a draft that would give some certainty but would maintain the premise of true neutrality.

Now, Mr. Boucher, you are a smart guy, you know? You are a lot smarter than me. But you understand, and I want to commend you for your—you were the only one that really made any political comments, you know? You put it on the table. You have great candor, and I appreciate that.

But 1934, when we passed whatever we call that Act, the Communications Act, there was one phone company basically. Now, there were some small rural telephone companies, but if you wanted a phone company in your particular area, you went to one company. You went to one company. Today in Ennis, Texas, if I don't like my Internet provider, which is Charter Cable, AT&T will come in and do it for me. Verizon will come in and do it for me. There are any number of providers that all I have to do is pick up a solicitation letter in my mailbox or next time the phone answers say yes to somebody who wants to provide me different Internet services. There are all kinds of competition.

Title II was passed when you had one provider. Do you agree with that?

Mr. BOUCHER. Mr. Barton, I don't disagree with anything that you just said. The phone——

Mr. BARTON. Including—and everybody else.

Mr. BOUCHER. The tone that I would express that sentiment in is the following, that there is a better way. Title II is kind of a

blunt instrument. It is a relic from another era that doesn't fit very well in today's highly competitive communications market where you have got the world's most capable platform for delivering information of all kinds and multiple parties delivering access to that platform, depending on whose service you want. Title II was never conceived for an environment like that. There is a better way, and the better way—I will come back to my original remarks—is for this committee——

Mr. BARTON. I am not going to let you filibuster too long.

Mr. BOUCHER. Well, I am only going to take about 10 seconds here, but you come together on terms that are for today's modern era that offer network neutrality assurances and maintain broadband as a lightly regulated Title I information service. That honestly is what is called for in today's environment.

Mr. BARTON. In the Chairman's draft as he has put out, you would generally support it?

Mr. BOUCHER. I think it moves in the right direction, and I think it is important to note how far the Republicans have now moved toward the historic Democratic position.

Mr. BARTON. See, and that bothers me.

Mr. BOUCHER. Well, I know you, and I am not surprised. But I hope you will see the light this time. And let me just stay that I think it is a major development that now everyone is talking about the best way to preserve network neutrality, and the best way to do that is a narrowly crafted statute that gives permanence to these principles.

You know, we have been debating this issue now for a decade, and everyone has more important work to do. Mr. Wheeler at the FCC has more important work to do, but he is going to spend a lot of time responding to requests here and litigation in court unless this issue is put to rest.

So a decade into it now, it is time to settle it. This committee has within its ability the power to do that——

Mr. BARTON. OK. I want to——

Mr. BOUCHER [continuing]. And both of you have an incentive. Both sides have an incentive to get it done. So I hope you will.

Mr. BARTON. I want to go to Mr. Atkinson very quickly. Do you and the people you represent generally support what Chairman Walden and Chairman Upton have put out in draft form?

Mr. ATKINSON. I would associate myself with Congressman Boucher's remarks. I think it is in the right direction. I think there is room for compromise in it. I think the Democratic side has raised some points that have validity. Though it is not a perfect bill in my view, but it is a very, very important first step and it lays the groundwork for a legislative solution.

Mr. BARTON. Thank you. And thank you, Mr. Chairman. I yield back.

Mr. WALDEN. The gentleman's time is expired. Now we go to the gentleman from Pennsylvania, Mr. Doyle, for 5 minutes.

Mr. DOYLE. Thank you, Mr. Chairman, for holding this hearing, and thank you to all the witnesses, particularly my good friend and colleague, Rick Boucher. It is good to see you back here, Rick.

I am excited to see the FCC take this next step tomorrow in protecting an open Internet. I think the Chairman has recognized the

passion and interest that people around the country have for this issue, and he has seen broad support from an array of stakeholders, from investors to venture capitalists to edge providers and ISP. Most recognize that the sky isn't falling, and many applaud the certainty that these rules will bring to the marketplace.

You know, this morning I was checking the stock prices for many of the major telecom companies, and most companies' values were up. So clearly investors don't think the sky is falling, either. Statements by executives by many of the Nation's largest telecom companies reflect their expectation that these rules won't change their investment or deployment strategies and that they believe properly crafted rules will not affect their businesses.

I also want to point out that the FCC is also moving forward to grant a number of petitions by communities to lift restrictions on municipal broadband deployments. I think that is a great step in the right direction, and I think the communities can bring some much-needed competition to the broadband market.

And finally, let me say with regards to some of the concerns expressed by Ms. Blackburn, the Washington Post fact checker looked at this study that she cites and completely debunked the study. The fact checker said the more complex the issue, the easier it is for politicians to obfuscate the reality of the dramatic numbers, and our constituents deserve better than scare tactics that deliberately mislead the public and gave it three Pinocchios. So I think that speaks to that issue.

Mr. Kimmelman, I want to follow up on a question that Mr. Pallone asked you. This proposal by the White House sounds like it would severely undercut the FCC's authority to prevent ISPs from using their position in the marketplace to do things like charging subscribers not to have their browsing history data-mined or setting super-cookies that allow users to be identified and tracked across the Internet.

What benefit do you see in the FCC's ability to enforce privacy protections on ISPs and what do you think would be lost if that authority was removed and vested in the FTC that may lack the authority to establish bright line rules the way the FCC could under Title II?

Mr. KIMMELMAN. Mr. Doyle, I think it is a very serious concern if what you describe is accurate. I think that consumers across the country rely upon the infrastructure of communications in this country to protect their privacy. It has historically done so. Section 222 has been used for that, and I think we need to look at that in the broadband environment. It would be extremely unfortunate if that were thrown out the window at this moment.

I have a concern just based on the characterization that you provided and Mr. Pallone that the administration which had been working on privacy legislation 4 years ago and had brought together many stakeholders has pulled something out of the drawer and hasn't maybe fully looked at changes in the environment, including the regulatory environment, since those ideas were first floated. And I certainly hope that they are updating that and are listening to the concerns raised.

This would be a very significant concern for consumers if all of a sudden they thought their privacy was in jeopardy.

Mr. DOYLE. Mr. Kimmelman, some have argued that paid prioritization and unencumbered zero rating of apps and services can be beneficial to consumers. Others say that these policies could lead to greater barriers to entry in the marketplace and in fact hurt consumers by limiting the array of new businesses and start-ups that can climb the pay walls that these policies erect. Where do you stand on that?

Mr. KIMMELMAN. Mr. Doyle, I think paid prioritization can be extremely dangerous to the Internet ecosystem that we have today. I constantly think back to what Tim Berners-Lee has talked about as permissionless innovation. He didn't have to ask anyone to develop the World Wide Web. I think that is an important concept to keep in mind here.

Now having said that, that does not mean everything is—it is one size fits all as Rob has said. It means there needs to be important regulatory oversight functions applied as to what a particular service does, whether it is beneficial to the competitive process, whether it opens opportunities for innovators, whether it creates a new competitive option in the marketplace.

So I wouldn't classify every service one way or the other, but in general, I think there should be a big alarm bell goes off when you see something that looks like paid prioritization as a starting point.

Mr. DOYLE. Thank you. Mr. Chairman, I will yield back.

Mr. WALDEN. The gentleman yields back his time. I would like to ask unanimous consent to submit in the record a letter from Mr. Mark Cuban who says the market is aware of the uncertainty the FCC is creating—and will respond accordingly by creating volatility, and a story in News Bay Media. Moffet Downgrades Cable Sector on Title II Woes. Without objection, those two items will be inserted in the record.

I now turn to Mr. Olson. Are you sure it is not Mr. Shimkus, I believe was here?

VOICE. Sorry, sir.

Mr. WALDEN. Yes, Mr. Shimkus overriding my own counsel here for the next 5 minutes.

Mr. SHIMKUS. Thank you. Well, it is great to be here, a great panel, great discussion, and again, it is good to see Rick here, although his real name is Frederick Carlisle, goes by Rick. So I did my due diligence.

Mr. Atkinson, given the Title II explicitly allows for discrimination, how can the FCC place an outright ban on paid prioritization?

Mr. ATKINSON. Well, I disagree with this notion on paid prioritization. If we really want to ban paid prioritization, then we should ban CDNs, content delivery networks, that major companies like Netflix use. They are paying to get their traffic as close to the customer as possible. And a little Silicon Valley start-up, maybe they can't pay for a CDN.

So I think this notion that somehow some kind of paid prioritization is OK and some kind is not. Now my position is we should let the market determine that. I actually think this could be really good for start-ups. There may be start-ups that can't afford to use CDN services. They may want to say, I have an application that has what engineers call low latency needs. The best efforts Internet isn't going to do that. As long as the rule says that

if you don't pay you always get best efforts Internet, we can never have a system where a carrier says you have to pay to get best efforts. So that is what any congressional rule has to say.

But if you want to go beyond it, it is like I can get a 40-cent stamp or whatever it costs for the mail today, but if I want to go beyond it as a businessperson, I have the right to get it. And I think that is very much pro-consumer and pro-business.

Mr. SHIMKUS. But to have the certainty, that would require legislation. That would require language other than FCC going to the current Communications Act and then trying to wiggle in one section over the other.

Mr. ATKINSON. Right. Absolutely. And that is why we supported so strongly Chairman Wheeler's initial proposal because he allowed paid prioritization, but he said it has to be reasonable and has to be pro-consumer and there are some safeguards around it. But he backed off from that position. I am not sure why. But I think that was the right position. And guaranteed, if the FTC goes forward tomorrow with Title II, you won't be able to have that level of customization.

Mr. SHIMKUS. I have been told to make sure I answered the same way. I am not sure why, but I think I know why. Rick, you have looked at the European use of broadband, and it is obviously a different way of handling that. Obviously the concern and part of this debate is that by moving into Title II, we may be falling into the same trap as the European community. Can you address that?

Mr. BOUCHER. The Internet Innovation Alliance with which I am affiliated, did a study which we published about 3 weeks ago. The results of that are on the Alliance's Web site. And in that study, we took a close look at the broadband performance of Europe versus the United States. We did that in parallel to the regulatory structures that prevail in Europe and also in the United States.

In the United States we have historic light touch regulation going back about a decade now for broadband, and that light touch regulatory environment has been very welcoming to investment.

In the European Union for about the same period of time, going back to about 2002, they have had a more intrusive regulatory regime characteristic of their regime and most of the member states of the EU is something called unbundling and least access over the last mile. And that basically means that competitors are welcomed on to the incumbent's network at a set price, at a regulated rate.

The history is pretty clear that in the European Union that least access requirement has impeded investment, and on virtually every measure of Internet capability, the European Union is behind the United states, behind in access to broadband capabilities on the part of the public, behind in terms of speed, behind in investment on both the wired and wireless side and even the European Commission has now concluded that the reason their performance is lagging is because of the intrusive regulatory structure that they have and has recommended to the member states that for next generation networks, the fiber optic deployments, the gigabit level networks that are only now beginning to come to Europe, even though we have them more commonly in the United States, that the member states should not apply the least access regime, saying that to do so would impede investment.

So the simple conclusion we reach in our study is that at the very time when we appear to be moving now toward Europe in terms of a regulatory posture with Title II reclassification. Europe is now moving our way and lightening up its regulatory structure. Now, the FCC is proposing to forbear from imposing least access, but I will be very surprised if Title II is adopted, if you don't see some competitive carriers suing, saying that the FCC did not have an adequate record to undertake that level of forbearance and saying that now that Title II applies, there has to be least access. Rob Atkinson earlier said that Title II is going to create a lot of uncertainty. This is yet another example of where I think it will.

Mr. SHIMKUS. Thank you.

Mr. WALDEN. The gentleman's time expired. We now go to Mr. Yarmuth for 5 minutes.

Mr. YARMUTH. Thank you, Mr. Chairman. Rick, it is good to see you. Thanks to all the panelists. Now we have heard arguments that the FCC's net neutrality rules will make Internet speeds offered to American consumers as slow as those in Europe. But according to Akamai's most recent State of the Internet Report, average U.S. Internet speeds ranked behind what consumers can get in Moldova and 20 other countries.

I will address this to Mr. Kimmelman. Do you think that American broadband consumers are getting a good deal as compared to their European counterparts?

Mr. KIMMELMAN. Thank you, Mr. Yarmuth. I think it is really hard to do apples-to-apples comparison of the U.S. and Europe. Some of their rules are European Union-wide. Some of them are nation-specific. So it is a bit tricky.

But in general, there are some policies they are imposing that are much more government driven, that much more come out of a single provider monopoly environment, and they can keep prices low and they can open up their platforms. And then they have other problems.

And I think the better way to think about it is can we do better here with our speeds and with our deployment, and I think the answer is clearly yes. I don't think it is to follow a European model as such, and I don't think Title II is anywhere near the same as what most of the Europeans have done. But I think the goal of actually pushing up speeds of reaching higher for what has now become this essential platform for economic and social growth in our society, absolutely, yes. We should be pushing as hard as possible.

Mr. YARMUTH. Some of your fellow panelists seem to take a different view of the current state of consumer choice in the American broadband market. I know in my district, there is one provider that dominates the market. Essentially that is the only game in town. What is your view on the level of broadband competition our constituency currently enjoy?

Mr. KIMMELMAN. I think there are a number of different measurements that are being used. The FCC is now pushing the envelope to really push for greater deployment. But by anything other than a snail's pace, we lack robust competition in our broadband market, particularly for the delivery of video quality services. And so often one provider, sometimes two. Mr. Barton I guess is lucky to have, fortunate to have more. Some people can use wireless for

a variety of services but usually not the most robust video delivery system.

So we suffer from a very significant problem and lack of competition.

Mr. YARMUTH. And what about the issue of cost versus quality and service? How do we rate in terms of what consumers pay for quality video?

Mr. KIMMELMAN. Well, again I hate to say anything too definitive because different countries have different rules, different frameworks. But there is no doubt there are some countries that have faster speeds and better quality. And I would just urge the committee to look at what are the policies that go with those that actually deliver that. Sometimes it is with greater government involvement, and that is something to actually consider as a matter of tradeoff.

Mr. YARMUTH. Just as a matter of principle, if you have one provider with very little regulation, then the odds of getting good service at a reasonable cost are lower than if you had either multiple providers in a vibrant competition or some kind of heavy-handed regulation.

Mr. KIMMELMAN. Absolutely. And I will just point out that going way back in history, we did have more of the open market that Mr. Atkinson was talking about, and it was bedlam. There was a refusal to interconnect in the early 1900s which led to the development of the AT&T monopoly with a set of public obligations that came with it.

So obviously a different timeframe, but I just raise the admonition. The economics of that could still be problematic, that interconnection is not something that has traditionally worked well in a totally free-market environment.

Mr. YARMUTH. Great. Thank you, Mr. Chairman. I yield back.

Mr. WALDEN. The gentleman yields back the balance of his time. The chair now recognizes the gentleman from New Jersey, Mr. Lance, for 5 minutes.

Mr. LANCE. Thank you, Mr. Chairman. Mr. Atkinson, in your testimony you eschew the term net neutrality in favor of a more generic term, network policy. You say, and I quote, any network policy for the 21st century recognizes that the Internet is not inherently neutral and that while some forms of traffic differentiation can be anti-consumer or stifle innovation, other forms may enable innovative new services. And I would like you to elaborate. Perhaps that might be in healthcare or educational fields, but I ask for your expertise into how this could further innovation.

Mr. ATKINSON. So I think one of the things that has been striking about this debate is the absence of the voice of network engineers. The Internet has never been neutral, and it is not neutral now. In the Internet engineering space, there are different priorities that network traffic receives because frankly, if your email goes and you get it 50 milliseconds late, you don't notice and you don't care. But if your two-way video with your doctor is 50 milliseconds late, you basically cannot have that conversation with your doctor. Fifty milliseconds is way too long.

So the idea that we would treat all traffic the same is essentially an anti-consumer. It is going to stifle these kinds of innovations.

If I can just make one quick point about the question on competition, we released a report last year called The Whole Picture where we looked at competition. Using the OECD data, we have the third most-competitive intermodal broadband market in the world. We are almost tied with Korea and Canada. We have more intermodal competition, in other words, two providers serving each home, than any other country. The reason there are a few countries ahead of us like Japan, like Korea, is really two factors. They have very high population density. They are serving apartment buildings largely. Super-easy to do. And secondly, they have put in massive government subsidies. Now, we can have an argument about whether that is a good policy or a bad policy, but many of these countries have used public monies from tax incentives and grants.

So this notion that somehow we are lagging behind because of the light touch regulation I think is mistaken.

Mr. LANCE. Thank you and I appreciate that point. You said in your testimony the almost certain legal challenges to the FCC's Order and the uncertainty that would in turn create as evidence that a legislative route would be better than the FCC's reclassifying broadband under Title II. How long do you think the legal challenge would last if this were to occur?

Mr. ATKINSON. I imagine it would begin quite soon, and I would agree with Congressman Boucher, I think you are talking 3, maybe 4 years before we would end up with any sign of real decision and certainty, whether this we can do a go or no-go.

Mr. LANCE. Thank you, and others on the panel are certainly willing to——

Mr. BOUCHER. Let me just——

Mr. LANCE. Yes, thank you, Congressman. Yes.

Mr. BOUCHER. Just to look at the most recent decision in this space. It was the Verizon decision of the D.C. Circuit.

Mr. LANCE. Yes, sir.

Mr. BOUCHER. It invalidated the FCC's 2010 Open Internet Order.

Mr. LANCE. Yes.

Mr. BOUCHER. More than 3 years from the time the suit was filed until the decision was handed down. You know, my point is that puts us into the next presidential administration. If there is a Republican FCC at that point, the network neutrality for all practical purposes is gone. There will no longer be network neutrality assurances. Those who strongly support network neutrality should be looking for greater permanence. A statutory alternative offers that.

Mr. LANCE. And regarding the former case, did that go, sir, to the Circuit Court here at the DC——

Mr. BOUCHER. Yes.

Mr. LANCE. And of course, in this situation, there is the potential that it could be appealed further and the Supreme Court might grant, sir, and that would even be a longer period of time.

Mr. BOUCHER. Yes.

Mr. LANCE. Yes. Thank you. Mr. Downes, you have cited in your testimony how network management technologies could exist regarding oversight of the FCC. Do you believe that this will lead to reduced investment and innovation on the part of ISPs in broadband networks?

Mr. DOWNES. Well, it depends I think on how far the FCC goes now or in the future in terms of this public utility regime. Obviously we have investment in our public utilities including the wireline telephone network, but it is clearly not at the same pace and at the same froth level as what we have seen in the last 20 years under the light touch regime.

Mr. LANCE. Thank you, and Mr. Chairman, I yield back 16 seconds.

Mr. WALDEN. The gentleman yields back the balance of his time. The chair now recognizes Ms. DeGette next up.

Ms. DEGETTE. Thank you, Mr. Chairman. You know, as a supporter of net neutrality, I have been glad to see that the latest debate has led to a consensus around principles of access to lawful content, no harmful discrimination, and transparency. These are really the core principles that have been laid out, both in the Republican draft and also in Democratic proposals, and also the White House is in favor of this and most importantly maybe is what our constituents expect when they use the Internet. But of course, the constituents expect much more than just an open Internet. They expect faster speeds, affordable prices, and access to new and innovative content.

So for the last decades, the virtuous cycle of investment and innovation have given consumers these advantages as well. I know there is disagreement among the panel about the best way to implement net neutrality, but I want to step back to the core net neutrality principles, and I want to ask each member of this panel the same question. And this can be answered yes or no. Are the net neutrality principles of access to lawful content, no harmful discrimination, and transparency if properly implemented compatible with the continued investment necessary to give consumers the broadband experience they expect? Mr. Boucher?

Mr. BOUCHER. Yes.

Ms. DEGETTE. Mr. Kimmelman?

Mr. KIMMELMAN. Absolutely, yes.

Ms. DEGETTE. Mr. Atkinson?

Mr. ATKINSON. Yes.

Ms. DEGETTE. And Mr. Downes?

Mr. DOWNES. Yes, especially the way you phrased it, yes.

Ms. DEGETTE. Thank you. So I am glad that we all agree that strong net neutrality can be an unambiguous win for consumers. I want to—do you want me to ask this?

Mr. LUJAN. If——

Ms. DEGETTE. OK.

Mr. LUJAN [continuing]. You want to yield.

Ms. DEGETTE. I will yield—let me ask one more question. Then I will yield to you if that is OK. Mr. Lujan has an excellent question that he wants to ask. Mr. Kimmelman, some have suggested that the power of the free market is sufficient to protect the open Internet, but in your testimony you pointed out that some of the biggest ISPs have admitted there is a business advantage to violating open Internet principles. Is this merely a theoretical concern or have we seen cases of business actually trying to gain an advantage on their competitors by violating net neutrality principles?

Mr. KIMMELMAN. We have seen examples, Ms. DeGette. Fortunately we have had rules in place or we have had rules proposed for a long period of time that have very effectively disciplined most market behavior. And so we haven't seen a lot, but we have seen this and it is very simple. It can be advantageous to the bottom line to favor one's own content, to favor one's own preferential relationships in content providers to make more money. And so there is nothing nefarious about it. It is a natural economic incentive——

Ms. DEGETTE. Right.

Mr. KIMMELMAN [continuing]. For these ISPs to pursue suction actions.

Ms. DEGETTE. Thanks. Of course, Congressman Boucher, we all agreed up here after your testimony that we should just hire you as a mediator to work out this legislation. So I want to ask you. You said we need to have narrow bipartisan legislation, but you single out the network neutrality principles as a key non-negotiable element. So why do you think the debate has moved past negotiations over network neutrality principles?

Mr. BOUCHER. I think very simply because both sides now have quite a bit of leverage, and when both sides have leverage roughly equal, and I think that is the situation today, it is the optimal circumstance for legislating.

There are two key principles that really matter here, and the first of these is that the Republican offer for imbedding strong network neutrality principles in the statute be accepted by Democrats. In return for that, we ought to be continuing to treat broadband by the proven method and that is an information service subject to Title I with light regulation. We have had that for a decade, and we have developed the most capable Internet by virtually every measure that exists anywhere in the world. If you add all of our ecosystem of the Internet together, it is the envy of the world. Let us not upset that very workable formula. Keep Title I in place. Those are the two key principles of legislation.

Ms. DEGETTE. Thanks.

Mr. BOUCHER. And I think the fact that Republicans have moved as far toward the Democratic position as they have is really a major development. It is noteworthy, and it is because of the leverage the Democrats now have as a consequence of the reclassification decision.

Ms. DEGETTE. Thanks. And I yield the balance of my time for follow-up to Mr. Lujan.

Mr. LUJAN. Thank you very much. I thank the lady from Colorado. Mr. Atkinson, something that you said earlier caught my attention. You said in regards to Mr. Boucher that that Mr. Boucher had valid issues regarding the Republican discussion draft. Can you expound on that?

Mr. ATKINSON. Well, I am not in a position to go into a significant amount of detail, but I think there are 2 key points there. One is there are valid issues because there are no Democrats who supported that. And so you cannot get this bill passed with the President signing it unless there is some compromise. So I think that is point number one. Point number two is the FCC—I think the bill could go slightly further giving the FCC some authority. Now what I think the bill rightly does, under 706 for example, there us unlim-

ited authority. 706, you can use that to justify pretty much anything, and that is clearly too broad and was clearly too broad when it was passed in '96.

So there needs to be some constraints on the FCC in our view, but also at the same time they need some abilities to be able to go out and effectively police issues.

Mr. BOUCHER. If I may, Mr. Lujan, since you were asking about my thoughts and if the Chair will just indulge me for a moment, I am going to take issue a little bit with what Mr. Atkinson just said about 706. I did note at the outset that I had some issues with the Republican draft. I am going to be very candid to say that I think when the draft suggests that Section 706 not be deemed an affirmative grant of authority to the FCC, that does go too far. And that is not a necessary provision in order either to assure that we have strong network neutrality principles in the statute or to continue the light touch regulatory treatment that broadband enjoys today.

So as a starting point while Democrats sit down with Republicans to negotiate an agreeable statutory formulation, I would hope Republicans would say, you know, that does go fairly far. We acknowledge your concerns. We are willing to take that provision out. To me that would be a sensible step to take.

Mr. WALDEN. The gentleman's time, gentlelady's time, has expired, and we appreciate the comments from former member, former chairman. At least we are having those discussions with you. Mr. Collins for 5 minutes.

Mr. COLLINS. I want to thank the witnesses today. It seems as though the discussion now has moved from net neutrality to Title II because we have all coalesced around the concept of net neutrality. So Mr. Atkinson, you brought up the point that you are fairly certain litigation is the next step absent congressional legislation. I think I heard Mr. Downes say that could be 2-plus years. So I am a private-sector guy, an entrepreneur. You make investments based on as much certainty as you can get. That is kind of a rhetorical statement. And as you introduce uncertainty, doesn't mean it is all or nothing. Some would say, well, isn't there going to be investment? Well, sure there is. But the more investment I think the better to certainly grow broadband and the others. We want more investment, not less. It is my belief as a private-sector guy, uncertainty brings less investment than certainty. And as I now look at where we are with the upcoming rule as we understand it from the FCC, it is disappointing to say the least that the FCC in what they are going to do, relative to Title II, the consequences of what I call that overreach will be uncertainty. And with that, less investment than otherwise. It doesn't mean no investment but less investment, and that is not a good thing which is why I think I am very happy to hear a lot of consensus. It is the role of Congress to push forth a bill. If we do so, we do it in a bipartisan way that should trump what the FCC is going to do.

And so Mr. Atkinson, I would like to talk a little more about the litigation piece, where you see it coming, how quickly you see it coming, and if you agree with me that in the arena of litigation absent something else, there will be less investment than more.

Mr. ATKINSON. I do agree with you. It won't be catastrophic but at the margin there will be likely less investment if we go down this path.

I also would like to point out the uncertainty, really, I think is for both sides on this debate. I mean, there is a legitimate argument I think that the advocates of net neutrality make that Silicon Valley entrepreneurs or other offers, they need some level of certainty. You know, are they going give me 5 years to know? Carriers do this. Totally agree with this. Carriers need certainty. My concern with Title II and what the Commission is doing is it really is not providing certainty. It is providing certainty in a way for maybe a year or 2 or 3, but don't forget. We have an election coming up, and just say for the hypothetical, 50/50 chance. That means you have a 50/50 chance that you are not going to have any rules

I agree with you on the legal challenge. I think what we will see, as Mr. Downes said, rent-seeking from particular carriers with particular interests or other groups who will go in and say, you know what? We can gain a slight advantage over our competitors if we challenge the FCC on this particular component. And that is perfectly reasonable for them to do. It just will gum up the entire process.

Mr. COLLINS. Now, as I understand it, there is something around 1,000 provisions in Title II, and we have heard rumors anyway that they are going to forbear on this one, this one, and another one? Maybe forbear on the ROI as we limit returns on electric utilities, true monopolies that they would forbear on that piece which would be the death of the Internet if they decided the rate of return could be 6 percent or something like that. But with a thousand provisions, and we don't know which ones they will forbear on or not. Isn't it also in the uncertainty realm once they have Title II, they forbear now, a year from now, 2 years from now a different president. They decide not to forebear. So I will go back again. I am encouraged to hear I think almost a coalescing. We need congressional legislation on net neutrality. Title II is just a wet blanket on it, and perhaps that is part of the incentive that has brought us together. Well, let us not question that. We are I think more together than not. But especially, would you agree that those thousand provisions and forbearing or not is really what is going to have this gummed up?

Mr. ATKINSON. I would definitely agree with that, that this is going to provide anything but certainty.

Mr. COLLINS. Mr. Downes, any comments in our last 30 seconds?

Mr. DOWNES. Yes, while I agree with Mr. Atkinson, and as I say, I am just baffled by the Chairman's decision here because as he himself said, when the DC circuit ruled in the Verizon case, it provided him a roadmap and an invitation to reenact the 2010 rules under Section 706. It was, you know, certainly not without legal risk but certainly nothing compared to the legal risk now of Title II and all the forbearance proceedings that will go with it.

Mr. COLLINS. All right. I want to thank all the panel today. I yield back, Mr. Chairman, my last 10 seconds.

Mr. WALDEN. The gentleman yields back the balance of his time. And now we turn to the gentleman from Illinois, Mr. Rush, for 5 minutes.

Mr. RUSH. I want to thank you, Mr. Chairman. Mr. Chairman, I had been involved in another hearing, a Joint Subcommittee hearing downstairs. And so I have not been able to participate as fully as I would like. But the time that I have been here, this has been quite interesting to me. I certainly want to take a moment to join in with the chorus of welcoming our esteemed colleague, Chairman Boucher back again. Your time on this subcommittee where I served with you was really an era of enlightenment for me. So I really want to thank you so much for your contributions, and I wish that we were spending as much time on reforming program carriage rules as we are on these issues that we are discussing, net neutrality and associated issues.

Reforming carriage rules especially as it relates to independent networks. I think that is something that we need to get to. That said, a free and open Internet with unfiltered access is what I believe we all want. You believe the Title II reclassification is not a viable solution in addressing net neutrality. In your years as chairman of this subcommittee, do you really believe that the FCC will be able to forbear all of the onerous provisions from Title II?

Mr. BOUCHER. Thank you very much, Mr. Rush, and thank you for your kind words and your words of welcome as I return to the committee to offer some views.

I think it is challenging for the FCC to undertake forbearance without the development of a complete record that justifies each of the forbearance steps. And the FCC's record in developing its forbearance decisions is really pretty thin. My guess, and I am just guessing, is that a lot of the basis of the litigation that is going to be upcoming is going to be challenging the absence of an adequate record for the FCC to take its various actions in association with this reclassification, forbearance among those actions.

So the short answer to your question is I think Chairman Wheeler is trying to forbear from the most onerous provisions of Title II such as tariffing requirements, rate regulation, least access and unbundling. He is making a serious effort to do that. I think his decision to do that is going to be significantly challenged in court, and we don't know what the outcome can be.

Coming back to my core point today, that is yet another reason that it is in the interest of everyone to use this moment to provide permanent protection for network neutrality, to do so in a statute, and also in that statute continue the light touch Title I treatment that has been so successful here for the last decade.

Mr. RUSH. You point out that the Republican discussion draft would codify transparency requirements and prohibit blocking, throttling, and paid prioritization. What is your position on including a ban on zero rating practices?

Mr. BOUCHER. I am going to forgo dissecting the legislative draft in any detail because I think that is uniquely the responsibility of the subcommittee, and there are clearly provisions in the legislative draft that ought to be open to discussion and negotiation as long as in the end what is achieved is the embedding of network neutrality principles and light touch regulation. This subcommittee will perform a great service.

So I would leave to the bipartisan conversation a discussion of the specific elements that are in the draft legislation.

Mr. RUSH. Mr. Chairman, I yield back.

Ms. ESHOO. I appreciate the gentleman yielding the remainder of his time. I think it is very important to raise the issue when it comes to legislation that there not be an automatic assumption that because there is the recognition that these three items are mentioned in the bill that they are automatically banned. There are problems in the legislation because there is no follow-up by the agency that has jurisdiction. In fact, the agency is prohibited on behalf of the American people to implement these so-called prohibitions.

So there is a distance to go, and this really needs to be addressed if there is ever any hope—and no one has raised this from the panel, and it is a very important item I think for all of us to know. There was something raised earlier about thousands of things in Title II. There are actually, what, 47 sections in Title II with only a handful that in my view need to be used relative to the regulations.

Mr. Chairman, I would like to ask for unanimous consent to submit a letter for the record from the Internet Freedom Business Alliance that supports the action the FCC is taking tomorrow on net neutrality.

Mr. WALDEN. Of course. Without any objection.

Ms. ESHOO. Thank you very much.

[The information appears at the conclusion of the hearing.]

Mr. WALDEN. Yes. And I must just respond to my colleague. There are actually a thousand, exactly a thousand provisions within the CFRs. That is where the rules are. That is the reference I believe Mr. Collins was making. And as for our draft legislation, the FCC would have complete and total enforcement capability to enforce the law. And so I would disagree with the characterization by my colleague.

And I would ask unanimous consent to submit for the record a number of items including a story quoting the Chief Operating Officer, Mike Sievert of T–Mobile where he says while there is nothing in there that gives us deep concern about our ability to continue executing our strategy, he said the reclassification is not the most desirable approach. Without objection.

We have a series of documents concerned with the partisan Title II approach including editorial from the Washington Post, a letter signed by Mark Cuban and others to the Commission. Some other publications I think have been shared with the minority, and without objection those will be in. We have some documents regarding people's views affecting small business from Barbara Espen, Counsel for the American Cable Association and ex parte that we would submit for the record.

Consumer Impact I believe is the next one from the Progressive Policy Institute that as much as $11 billion per year might be put on consumers' backs as a result of Title II reclassification, and we have information for the record regarding successful U.S. approach with European history with approach the FCC plans to take, a number of articles and statements. And I think that is the bulk of our submissions for the record. Without objection they will be submitted as well.

We thank our witnesses for your clarity to this issue and for your sharing your comments. We look forward to see what the Commission does and eventually actually having the opportunity to read the 332 alleged pages of whatever it is they are going to vote on tomorrow. So with that, the committee stands adjourned.

[Whereupon, at 12:26 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]



Federal Communications Commission
445 12th St. SW
Washington D.C., 20554

February 18, 2015

Dear Commissioners,

We are the "small, independent businesses and entrepreneurs" that Commissioner Pai referenced in his February 6, 2015 press release about the FCC's impending net neutrality rulemaking, and we write to say unequivocally that his release does not represent our views on net neutrality. Quite the opposite, entrepreneurs and startups throughout the country have consistently supported Chairman Wheeler's call for strong net neutrality rules enacted through Title II.

For today's entrepreneurs and startups, failure to protect an open Internet represents an existential threat. Because net neutrality is such an important issue, the startup community has been engaged in the Commission's Open Internet proceeding to an unprecedented degree. The clear, resounding message from our community has been that Title II with appropriate forbearance is the only path the FCC can take to protect the open Internet. Any claim that a net neutrality plan based in Title II would somehow burden "small, independent businesses and entrepreneurs with heavy-handed regulations that will push them out of the market" is simply not true. The threat of ISPs abusing their gatekeeper power to impose tolls and discriminate against competitive companies is the real threat to our future.

Contrary to any unsupported claims otherwise, we believe that the outlined proposal that the Chairman circulated last week will encourage competition and innovation by preventing ISPs from using their gatekeeper power to distort the Internet market for their own private benefit. A vibrant Internet economy depends on an open playing field in which small, innovative entrepreneurs can compete with incumbents on the quality of their services, not on the size of their checkbook or their roster of lobbyists. In *Verizon v. FCC*, the DC Circuit stated in no uncertain terms that, without reclassifying broadband under Title II, the FCC cannot impose the bright-line bans on ISP discrimination that startups need to compete. As such, any plan that does not include Title II reclassification cannot support strong net neutrality rules. We are pleased that Chairman Wheeler has recognized this simple reality.

Chairman Wheeler's plan is the best proposal we have seen to date for protecting the open Internet. While there are important details yet to be finalized, the substance of the rules that the Chairman circulated last week are encouraging. Any attempt to undermine the Chairman's proposal through obfuscation and innuendo is not productive, and certainly does not represent the opinion of the startups and entrepreneurs that have worked so hard to make the Internet great.

Sincerely,

Automattic
Dwolla
Etsy
Foursquare Labs, Inc.
GitHub
AgSmarts Inc.
Akorn Entertainment
AnalyticsMD
Angaza Designb
Are You a Human
Asensei
Authentise Inc.
Bento
Big Brothers Advice
Bigger Markets
Blu Zone
Borneo
BoxJelly
Bright Funds
Capitol Bells
Cheezburger
CitiQuants Corporation
CoCo
CodeHS
CoinPrices.io
Coolhouse Labs
CoreTCS
CrowdCover
Development Seed
DigiSoy Technologies
Distinc.tt
Duffy
eDivv, Inc.
Embed.ly, Inc.
Engage Colorado
Estate Map
Ethical SEO Consulting
Evol8tion
Fonebook
Imgur
Kickstarter
Tumblr
Yelp
Global Accelerator Network
Graph Story
Gravity
Gun.io
H-Farm
Happy Life Essentials
Hattery
JumpCloud
Kapuno Communities
Keen IO
LaunchTN
Lean Team Tuning
LightsOn Web Solutions
Localwells
Makai Software
MakersTour.com
Mapbox
Meetup
Modernrepo
Modria.com, Inc.
Newco Patform
Next Big Sound
Nocturnal Coding Monkeys
Notion
NourishWise
OneFire, Inc.
Overhead.fm, Inc.
PadMapper
PalateHome
Patch of Land
Plickers
Proto Venture Technology
Rachio
Ramen
Reality Crowd TV Media
Reinventors Network

Rockstar Digital
Rollbar
Safe-Xchange
Seed Sumo
Shapeways
SimPolaris
Sonic
Sphero
Sportsfeed
Start Co.
Sunshine
SunStyle
Survature, Inc.
Talko
TeamSnap
TerrAvion
The BKRY
The Iron Yard
Urban Airship
Vizonomy
Wohleb Scientific
Zoomforth
Zoummy.com

M BACKCHANNEL

Etsy CEO: How Net Neutrality Shaped My Life

I was once a newcomer on the web, and I want the next generation of entrepreneurs to have a free and open Internet, too.

I love the Internet. It has powered my career, the company I lead—Etsy—and our community of users. The truth is that a free and open Internet matters to a lot of us. And that's why I'm so happy to see FCC Chairman Tom Wheeler taking action this week to protect it. If the Internet hadn't been so wide open to newcomers, it's unlikely I would have ended up where I am today.

My appreciation of the free and open Internet started in 1993, when I was a newly minted graduate with an English degree, uncertain of my first career move. I took a low-level job doing data entry and filing at the News & Observer in Raleigh, North Carolina. The imposing fortress of filing cabinets that I navigated back then—packed with paper!—happened to sit in a department full of inspired people who were building some of the earliest web sites.

When I expressed curiosity about how the web worked, my colleagues generously offered to help me learn. They pointed me to websites with carefully constructed tutorials on how to build web pages. They told me to look at sites I liked and choose "view source" in my browser menu, which immediately displayed the code behind the page for me to learn from and use. Everything was free and open.

"Free and open" was what made the Internet work then, and it's a critical principle now. I didn't have to ask permission to build my first websites. I had unfettered access to materials that helped me teach myself how to code. As I learned more, I quickly came to understand that the Internet was so much more than a network of cables and wires that connected computers around the world. It was a platform for the purest expression of freedom, openness and possibility that I had experienced in my life.

Those early experiences on the Internet inspired me to pursue a successful career in technology, and connected me with people and knowledge from all over the world. Mine is a common story and one we need to protect for future generations.

Today, the free and open Internet is providing even bigger opportunities: democratizing access to entrepreneurship for millions of people, allowing tiny startups to unseat much larger companies and enabling Etsy sellers to compete with bigger, more established brands.

Etsy now hosts over 1.3 million sellers, 88% of whom are women, most of them sole proprietors working out of their homes. Individually they may be small, but together they sold over $1.35 billion worth of goods in 2013. That's the power of the Internet. But it only works if net neutrality—the idea that all traffic on the Internet should be treated equally—is protected.

Last January the courts overturned the FCC's attempt to impose net neutrality rules, and I worried not just about the Internet I love, but about all the businesses that depend on it. Until that time, we'd been living under de facto net neutrality rules as a result of earlier FCC actions, under both Republican and Democratic leadership. But in May, it looked as if the FCC would replace the overturned rules with much weaker ones, which would have allowed big companies to pay for faster access to consumers, putting them in the "Internet fast lane" and leaving the rest of us in the "slow lane."

Without strong rules, Etsy and the people who depend on our platform would suffer. We charge just 20 cents to list an item and take only 3.5% of every transaction. If broadband companies can charge websites for priority access to consumers, we'd likely have to choose between increasing our fees or leaving Etsy sellers in the slow lane.

Make no mistake, speed impacts the bottom line. Research from Google and others demonstrates that delays of milliseconds have long-term negative impacts on revenue. If people click on an Etsy seller's shop and perceive images loading slowly, they will click away, and that seller will lose the sale. This isn't just about a high-bandwidth service such as video. It's about any business that depends on the Internet to reach consumers, including the entrepreneurs on Etsy.

That's why I, along with many others in the startup and public-interest communities, started encouraging the FCC to establish new rules protecting real net neutrality under the strongest legal authority available to them—Title II of the Communications Act—allowing them to ban paid prioritization, throttling and blocking. The previous rules were overturned by the courts because the FCC used the wrong legal authority to justify them. This time, we want them to get it right.

In the last year we've made our case—not by hiring an army of lobbyists or making political contributions, but by telling the real stories
of the people who would be most affected.

I shared Etsy sellers' stories when Chairman Wheeler met with local startup CEOs at our headquarters in Brooklyn, and in conversations with the administration. When I testified at a recent Congressional hearing, I included accounts of Americans who would be affected by the decision. For example, I shared the words of Tina, a seller from Spring Valley, Illinois, who had told us that her family relies on "all my sales to make ends meet. Any change in those and it's the difference between balanced meals for my children and cereal for dinner." I wasn't only representing my company—I was representing our whole community.

Our sellers spoke up on their own, too. Amanda, from Oregon, expressed a common sentiment in her public comments to the FCC:

I am a small business owner and much of my business is conducted online, specifically through Etsy.com. If Net Neutrality is struck down, smaller businesses like mine will have no chance to compete against larger companies, which is bad for both individuals and America at large...the success of small businesses is a success for everyone.

All told, 30,000 members of the Etsy community contacted Congress and the FCC in a single day. Many of them even made products urging the Chairman to protect the open Internet. In total, over four million people submitted public comments to the FCC.

Their voices made a difference. Throughout the year, I was told repeatedly that these stories helped policymakers understand the real-world impact of the issue. Chairman Wheeler often invoked Etsy sellers as the businesses he hoped to protect.

On Thursday, the FCC will vote on clear, bright-line rules that would offer strong protections of net neutrality. I applaud this decisive action.

Some worry that broadband companies plan to challenge the new rules in court, creating uncertainty for businesses such as Etsy. Though a court challenge is likely, we lived under similar conditions between 2010 and 2014, when Verizon challenged the FCC's last set of net neutrality rules, without negative effect. The rules are on much stronger legal footing this time around. I'm optimistic that they will hold up in court.

Congress has also indicated it would like to act to protect net neutrality. It's encouraging to see bipartisan support for the open Internet. If Congress acts, I urge lawmakers to treat the FCC's rules as the baseline for any net neutrality law, not the high water mark. It's also important that any new law preserve the FCC's ability to address new, unanticipated types of discrimination. Having worked in this industry for most of my adult life, I know how quickly technologies change. How can we be sure we've anticipated every possible type of discrimination today?

Throughout this debate, net neutrality opponents have subjected us to a parade of horribles. Classifying the Internet under Title II will deter investment, critics argue. Yet Verizon and Sprint executives have said they will continue to upgrade their infrastructure. Some claim that net neutrality will create new taxes; the Washington Post's Fact Checker column has debunked much of that claim. Perhaps the FCC will start deciding the rate you pay your broadband provider? Unlikely, as the Chairman himself has said otherwise.

Instead of capitulating to scare tactics, we should celebrate Thursday's vote. Individual voices will prevail over Washington insiders. Truth and reason will prevail over misinformation and ideology. Best of all, the Internet will prevail as an engine of economic opportunity, the likes of which we have never seen before.



Written on Feb 20 by
Chad Dickerson
CEO, Etsy

IFBA INTERNET FREEDOM BUSINESS ALLIANCE

February 25, 2015

The Honorable Fred Upton
Chairman
House Energy and Commerce Committee

The Honorable Frank Pallone
Ranking Member
House Energy and Commerce Committee

Dear Chairman Upton and Ranking Member Pallone,

As a coalition of startups, small businesses and venture investors, we are writing to ask for your support of an open Internet – the principle that all traffic over the Internet be treated equally.

Federal Communications Commission Chairman Tom Wheeler has released a proposal outlining the path forward for open Internet access. We think this is a tremendous step in the right direction toward establishing clearly defined, legally sustainable rules that provide the certainty that businesses need to attract investment, acquire talent, and develop and market our products and services.

Our companies – and startups and small businesses across the country – depend on an Internet that fosters innovation, competition and open markets. It's important that the Internet remains open so the next generation of businesses can flourish. Unfortunately, broadband providers are spending tens of millions of dollars on a lobbying campaign to seize control of the Internet, which will only result in monopolistic behavior. Comcast, Verizon and AT&T would be allowed to arbitrarily dictate the products, services, and applications their customers can reach online, choking off innovation and investment that does not serve their own commercial interest.

Keeping the Internet open is vital to America's economic well being and should transcend partisan politics. While outwardly the issue appears dense and technical, in reality it is simple and one that Republicans and Democrats can support. The open Internet fosters innovation, entrepreneurship, and competition – all of which are necessary for the success of our individual firms and overall economic growth. Without strong, legally sustainable rules that protect all legal web traffic from harm and discrimination, both realized and yet unimagined, the qualities that make the Internet an unparalleled engine of economic growth, innovation, and free expression will be crippled.

While there are a number of myths percolating around efforts to safeguard access to the open Internet, the facts are clear. First, action to protect the open Internet will not lead to new state and local taxes; new taxes and fees on broadband services are prohibited under the recently reauthorized Internet Tax Freedom Act. Second, straightforward, sensible rules of the road that promote innovation are not "ObamaCare for the Internet," as some have called it. It is those who oppose an open Internet that would impede the free market and limit equal opportunities for all, from Main Street small businesses to major corporations, both online and in our communities.

We urge you to support protecting the open Internet, as it benefits every American, from local family businesses looking to attract new customers, to college students conducting research to complete their degrees, to senior citizens communicating with friends and family across the country. The Internet has been a tremendous driver of innovation and growth, and we hope Congress agrees it should remain that way.

Sincerely,

Automattic
Cogent
Distinc.tt
Etsy
General Assembly
Imgur
Kickstarter
OpenCurriculum
Opera Software
Tumblr
Vimeo

FRED UPTON, MICHIGAN
CHAIRMAN

FRANK PALLONE, JR., NEW JERSEY
RANKING MEMBER

ONE HUNDRED FOURTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115
Majority (202) 225–2927
Minority (202) 225–3641

April 2, 2015

The Honorable Rick Boucher
Partner
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005

Dear Mr. Boucher:

Thank you for appearing before the Subcommittee on Communications and Technology on February 25, 2015, to testify at the hearing entitled "The Uncertain Future of the Internet."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions with a transmittal letter by the close of business on April 16, 2015. Your responses should be mailed to Charlotte Savercool, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, D.C. 20515 and e-mailed in Word format to Charlotte.Savercool@mail.house.gov.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment

SIDLEY AUSTIN LLP
SIDLEY

SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
(202) 736 8000
(202) 736 8711 FAX

rboucher@sidley.com
(202) 736 8290

BEIJING HONG KONG SAN FRANCISCO
BOSTON HOUSTON SHANGHAI
BRUSSELS LONDON SINGAPORE
CHICAGO LOS ANGELES SYDNEY
DALLAS NEW YORK TOKYO
GENEVA PALO ALTO WASHINGTON, D.C.

FOUNDED 1866

April 7, 2015

The Honorable Gus Bilirakis
2112 Rayburn HOB
Washington, DC 20515

Dear Congressman Bilirakis:

Thank you for the opportunity to testify before the Subcommittee on Communications and Technology on February 25, 2015 at the hearing entitled "The Uncertain Future of the Internet." I am happy to address your question. Please find both the question and my response below.

1. **Congressman Boucher, if the FCC reclassifies broadband services as "telecommunications services," the U.S. will be subjecting broadband services to far more government control than ever before, including the potential to dictate important aspects of network management.**

   How would the U.S. have any credibility telling other countries, like China or Iran, not to control network management in their countries if we are taking large steps in that direction here?

During President Clinton's administration the decision was made to treat broadband as an information service with minimal government regulation. Over the past two decades, the United States has with marked success urged governments around the world to replicate the American model of an Internet free from government dictates. As part of that advocacy, we could point to our own regulatory model and to the tremendous levels of innovation and investment which light touch regulation spawned in our country. Due in no small part to the information services designation the US Internet has enjoyed since the earliest days of its commercialization, our Internet ecosystem from edge providers to robust broadband delivery infrastructures has become the envy of the world. I am concerned that the tremendous regulatory uncertainty which accompanies the imposition of Title II common carrier requirements on broadband will reverse that progress and among other harms diminish our ability to advocate internationally for minimal Internet regulation.

All of which underscores the need for Congress to act quickly to pass bipartisan legislation which assures statutory permanence for network neutrality principles while

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maintaining information services status for broadband. There is a clear opportunity for both Democrats and Republicans to achieve their core policy objectives with a narrowly drawn bipartisan measure. Democrats can achieve the goal they have sought for a decade of giving permanence to strong network neutrality principles. By placing a designation of broadband as an information service in the statute, Republicans can achieve their goal of continuing the light touch regulatory approach to the Internet which encourages both innovation and investment. Passage of such a measure would also enable the continuation of our global advocacy for an Internet free of government intrusion.

Please let me know if you have any further questions.

Very truly yours,

Rick Boucher

FRED UPTON, MICHIGAN
CHAIRMAN

FRANK PALLONE, JR., NEW JERSEY
RANKING MEMBER

ONE HUNDRED FOURTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115
Majority (202) 225–2927
Minority (202) 225–3641

April 2, 2015

Mr. Robert Atkinson
President
Information Technology and Innovation Foundation
1101 K Street, N.W., Suite 610
Washington, D.C. 20005

Dear Mr. Atkinson:

Thank you for appearing before the Subcommittee on Communications and Technology on February 25, 2015, to testify at the hearing entitled "The Uncertain Future of the Internet."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions with a transmittal letter by the close of business on April 16, 2015. Your responses should be mailed to Charlotte Savercool, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, D.C. 20515 and e-mailed in Word format to Charlotte.Savercool@mail.house.gov.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment

ITIF | INFORMATION TECHNOLOGY & INNOVATION FOUNDATION

April 15, 2015

Chairman Walden, Ranking Member Eshoo, and other distinguished members of the subcommittee. Thank you again for the opportunity to appear before you and share my thoughts at the hearing entitled "The Uncertain Future of the Internet" on February 25, 2015. I am happy to respond to the following additional questions for the record.

The Honorable Brett Guthrie

1. Small, rural carriers are important to my district, so I would ask you to provide your further thoughts on how they in particular might be affected if Title II regulations are challenged in court. What are some of the effects of protracted litigation that you would expect to affect these small, rural carriers both indirectly and directly, especially given that many of them will not have the resources to spend a significant amount of time or money in court, even though we expect a legal challenge to be initiated by some of the larger carriers?

Title II has profound, long-term implications as to how all players in this industry—large and small—will be regulated. It represents a reversal away from the longstanding policy of light-touch regulation that saw the successful growth of the Internet to date. Instead, the FCC has asserted that these businesses are common carriers, subjecting both their services and pricing to a "just and reasonable" standard.

Several small carriers have been outspoken in their criticism of the Commission's Open Internet Order. For example, Ron Smith, CEO of Bluegrass Cellular, a small mobile operator with headquarters in Elizabethtown, KY, has been quite critical of the FCC's recent actions. Smith recently explained:

> *"I will have a very difficult time making sure I don't cross any of [the FCC's] lines and as a result I think there will be a cooling hand on our industry.... Title II is not the way that wireless should be*

run. We don't want to be looking back at this and seeing that [the date of the FCC rules] was the day that mobility died."[1]

Your question raises important points. Many small carriers may not have the resources for independent litigation, but will also face substantial compliance costs if this regulation goes forward. Furthermore, the uncertainty under which operators will have to perform beneficial network management will make it more difficult for carriers large and small to best serve their customers. Rural carriers operate under less than ideal economic circumstances—costs are higher when homes are spread out and are more difficult to recoup.

Classification of broadband as a Title II telecommunication service has ~~profound~~ implications for how small and rural carriers would operate their business. Forget the net neutrality rules that were the pretext for this change in policy; numerous changes that will come with Title II impact investment decisions of small carriers. For example, potential changes to the universal service fund, utility pole access rates, data-sharing regulations, would all have profound impact on the decision of whether and where to invest. All of these issues are thrown up in the air because of the jurisdictional improvisation the FCC has to perform to implement basic, uncontroversial open Internet principles.

Bringing broadband under the common-carrier provisions of Title II, however, is too controversial to stand the test of time and will likely either fail in court or be walked back by a future administration. In the meantime, companies throughout this ecosystem will be left wondering what policy changes will stick, if any. By clarifying the FCC's jurisdiction and giving it basic tools to offenses to the open Internet, however unlikely they may be, Congress can give these industries the certainty needed to foster continued investment, innovation, and growth.

[1] Ron Smith, speaking at Competitive Carriers Association Global Expo, Keynote Panel, "Leading the Industry Forward: A CEO Panel Discussion," (Mar. 26, 2015), *available at* https://www.youtube.com/watch?v=dqgCVOdJCOg&feature=youtu.be&t=19m57s.

The Honorable Gus Bilirakis

1. Mr. Atkinson, in your testimony you reference the need for a balanced approach of regulation and oversight to produce a market that fosters innovation and provides room for a growing diversity of applications

Can you explain a little more how the reclassification to Title II would hinder further expansion of broadband applications and uses?

There are a number of ways in which Title II will hinder will hinder the expansion of different types of broadband applications. As a general matter, I believe the change from a light-touch regime of minimal regulations to thorough-going common carrier regulation, as well as the attendant uncertainty as to whether these decisions will withstand judicial scrutiny or future administration, will depress investment, at least at the margins. It is hard to say how or to what extent these regulations will impact investment in network buildout or upgrades, but it certainly won't encourage it.

More specifically, Title II (as opposed to rules grounded in section 706 of the Communications Act) is claimed to necessary if you want a flat ban on paid prioritization. A ban on any type of paid prioritization is a mistake. Here I stress, paid prioritization does not mean the Internet devolves into "fast lanes and slow lanes." Rather prioritization can take advantage of the varying needs of different types of applications to create a much more economical and efficient network overall, meaning more capacity and better performance and more revenues for reinvestment in even better networks.

Furthermore, any application or practice that comes anywhere near those proscribed by the FCC will at minimum have to seek out legal counsel. They may also require an advisory opinion from the FCC before, or possibly structure their business plans with coordination and approval from the FCC. And of course there is the uncertainty that comes with Title II since much of the rules are said to be foreborne, but whether this will actually be the case is unclear.

2. Mr. Atkinson, the FCC's plan to forebear certain aspects of Title II from applying to broadband is meant to be a lighter application of a burdensome

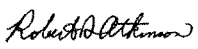
regulation. Won't this open the door for litigation from multiple angles in the future, not just over the FCC's ability to reclassify generally?

Absolutely—in addition to opening the door to litigation over the Title II classification itself, this change in policy will open the door to rent-seeking on a number of related issues. Classifying broadband as a Title II telecommunication service will have profound and wide-ranging implications for other regulations under the Communications act, and will trigger a series of other proceedings to sort out the consequences. Much of what was settled law will be up in the air, open to argument from all sides.

In addition to potential unintended consequences of Title II classification, forbearance likely will not suffice to cabin the FCC's new-found jurisdiction. Although the FCC may be well-intentioned in attempting to "modernize" Title II through forbearance, the majority of the regulatory power rests in the "just and reasonable" sections 201 and 202. The Commission has claimed a general ability to review conduct of broadband providers. Companies throughout this complex and ever-changing ecosystem will now have an avenue to argue their competitor's practices are "unreasonable."

Thank you for these insightful questions. I hope my answers are a welcome addition to the record.

My best regards,



Robert D. Atkinson
President and Founder
Information Technology and Innovation Foundation

FRED UPTON, MICHIGAN
CHAIRMAN

FRANK PALLONE, JR., NEW JERSEY
RANKING MEMBER

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Majority (202) 225-2927
Minority (202) 225-3641

April 2, 2015

Mr. Larry Downes
245 Willamette Avenue
Kensington, CA 94708

Dear Mr. Downes:

Thank you for appearing before the Subcommittee on Communications and Technology on February 25, 2015, to testify at the hearing entitled "The Uncertain Future of the Internet."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions with a transmittal letter by the close of business on April 16, 2015. Your responses should be mailed to Charlotte Savercool, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, D.C. 20515 and e-mailed in Word format to Charlotte.Savercool@mail.house.gov.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment

CENTER FOR BUSINESS & PUBLIC POLICY
GEORGETOWN UNIVERSITY McDonough SCHOOL of BUSINESS

April 10, 2015

Charlotte Savercool
Legislative Clerk
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515

Re: Questions for the Record, Subcommittee on Communications and Technology, Heading on "The Uncertain Future of the Internet," Feb. 25, 2015

Dear Ms. Savercool:

Attached are my responses to questions for the record from members of the Subcommittee.

It was an honor once again to appear before the Subcommittee, and I greatly appreciate the opportunity to supplement my testimony with answers to these questions.

Sincerely,

Larry Downes, Project Director
Evolution of Regulation and Innovation Project
Georgetown Center for Business and Public Policy
McDonough School of Business
Georgetown University

Responses to Questions for the Record of

Larry Downes

Project Director, Georgetown Center for Business and Public Policy

The Evolution of Regulation and Innovation Project

U.S. House of Representatives

Committee on Energy and Commerce

Subcommittee on Communications and Technology

"The Uncertain Future of the Internet"

February 25, 2015

The Honorable Brett Guthrie

1. **Small, rural carriers are important to my district, so I would ask you to provide your further thoughts on how they in particular might be affected if Title II regulations are challenged in court. What are some of the effects of protracted litigation that you would expect to affect these small, rural carriers both indirectly and directly, especially given that many of them will not have the resources to spend a significant amount of time or money in court, even though we expect a legal challenge to be initiated by some of the larger carriers?**

It is virtually certain that the order will be challenged in court, and indeed, two lawsuits have already been filed prior to the publication of the order in the Federal Register.

Given the enormous complexity of the final order, its many controversial rulings and changes to existing FCC regulations, and the unusual manner in which the final document differed from the Notice of Proposed Rulemaking issued in May, 2014, we can expect not only multiple petitions to be filed but that the briefing, argument, and opinion-writing activities associated with these lawsuits will take as long, if not longer, than Verizon's challenge to the 2010 order. The case was not decided until early 2014.

It is also worth noting that because the holding in an important U.S. Supreme Court case, ***NCTA. v. Brand X Internet Services***,[1] is challenged if not overruled *sub silencio* by multiple sections of the FCC's Report and Order, this case also has the potential to be appealed to the Supreme Court. ***Brand X*** upheld the FCC's interpretation of the definition of "telecommunications services" in the 1996 Telecommunications Act, which was that it did not include broadband Internet Access services and that,

[1] *NCTA v. Brand X Internet Services*, 545 U.S. 967 (2005).

therefore, such services were not subject to Title II public utility regulation. If the Court agrees to review any of the petitions that will be filed in response to the FCC's "reclassification," that could easily add another year to the process.

All of this translates to considerable uncertainty for all participants in the broadband ecosystem, including rural carriers and small ISPs serving rural communities. And that problem is particularly acute to rural providers, in that, to the surprise of many, the FCC's order extended the full scope of its many new regulations and Open Internet rules to all Internet access providers large and small.

As I wrote in a recent article reviewing some of the strongest legal arguments that will likely be raised against the order:

> Though the FCC, for now at least, is still leaving out of the scope of the order private networks run by universities and limited Internet access provided by airlines, coffee shops and other public locations, the new rules will apply the public utility treatment to every one of thousands of small ISPs, including small mom-and-pop companies offering service using fixed wireless antennae and unlicensed spectrum.
>
> But the agency's justification of potential anti-competitive behavior fits even worse here than it does with larger ISPs. Small ISPs have no market power with which to behave anti-competitively.
> Complying with the new rules—and answering complaints filed with the agency against them—will likely drive many out of business. Yet the FCC ignored pleas from the Small Business Administration and municipal broadband providers (in a separate order voted on the same day, ironically, the agency moved to free them from state restrictions–more litigation to follow) to leave them alone.
>
> A letter from 43 muni broadband operators predicted that "Title II regulation will undermine the business model that supports our network, raises our costs and hinders our ability to further deploy broadband." Denied.[2]

Even if rural providers do not participate directly in the litigation, or indirectly through their trade associations or by filing amicus briefs, I would expect many rural carriers will respond to the uncertainty of the protracted challenges by reducing future investments in new or expanded services or in new technologies that could improve the price and performance of their existing coverage.

Why? If the order is not significantly or even completely overturned, as noted, rural providers will be subject to a vast sweep of new rules and requirements, with which many will find it difficult if not

[2] Larry Downes, *On Net Neutrality, the Six Ways the FCC's Public Utility Order Will Lose in Court,* FORBES, April 8, 2015, *available at* http://www.forbes.com/sites/larrydownes/2015/04/08/on-net-neutrality-six-ways-the-fccs-public-utility-order-will-lose-in-court/.

impossibly expensive to comply. That's because, as you note, many smaller providers run on a very lean business model, focusing all of their budget and human resources on building and servicing equipment and on working closely with customers.

Few are likely to have full-time legal counsel or even much experience or need to work with outside counsel, and even then not the kind of specialized regulatory lawyers familiar with the ins and outs of Title II compliance on the one hand and FCC complaint processing and administrative adjudications on the other.

Thus a victory for the FCC could have devastating impact on the budgets if not the viability of smaller and more entrepreneurial providers servicing geographically sparse rural populations—an essential piece of the puzzle in improving both the availability and adoption of broadband technology in the U.S.

Given both the uncertainty and the potentially disastrous outcome, privately-owned rural providers will therefore be understandably hesitant starting now to make significant new investments in their businesses. Investors large and small who are aware of the litigation will likewise be less likely to invest in rural providers while the litigation is pending.[3]

And, if the FCC prevails, investment in rural providers is likely to become even more unattractive as the full impact of the evolving Title II regime becomes clearer. Given that the order agrees to forbear from some of the most onerous requirements of Title II only "for now" or "at this time," even after the litigation concludes the scope and cost of new regulatory oversight will still remain uncertain, perhaps indefinitely.

From start to finish, the FCC's decision to "reclassify" broadband and subject it to Title II will have a long-lasting chilling effect on rural providers until such time as the courts nullify the order or Congress legislates to rein in the agency.

2. **You note that many of the commercial activities that the White House and their supporters at the FCC appear to be worried about, and that are ostensibly driving Title II regulation, are already subject to FTC anti-trust and anti-competition law, but that the FCC's enforcement power under Title II would preempt the FTC from taking further enforcement action. In addition, as a result of preemption the FCC would lack access to the FTC's "legal toolkit," as you term it.**

[3] Even before the order was issued, at least one leading Wall Street analyst, Craig Moffett, had already downgraded the stocks of even the largest ISPs on the prospect of Title II regulation. See Georg Szalai, *Cord Cutting, Comcast Deal Risks Cause Cable Stock Downgrades*, THE HOLLYWOOD REPORTER, Feb. 17, 2015, *available at* http://www.hollywoodreporter.com/news/analyst-downgrades-cable-stocks-comcast-774297 ("On that Title II regulation, Moffett said he was 'far less sanguine' than investors seem to have been. 'At its core, Title II is about price regulation,' he said. 'It would be naive to believe that the imposition of a regime that is fundamentally about price regulation, in an industry that the FCC has now repeatedly declared to be non-competitive, wouldn't introduce risk to future pricing power.')

What do you expect the practical effect of this to be, especially in the context of forbearance—if the FCC forbears from only some provisions of Title II and not others, how might that affect the overlap of the two agencies' enforcement powers? Put another way, to what extent will the FTC be preempted from acting under Title II regulation if only some provisions of Title II apply in any given situation?

Section 5 of the Federal Trade Act categorically exempts from its authority any enterprise classified as a "common carrier." The FTC cannot enforce Congress's longstanding prohibition of "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce" against such entities.[4]

The extent (or not) of current or future forbearance has no bearing on the extent to which a Title II reclassification cuts off the jurisdiction of the Federal Trade Commission. If the FCC's effort to reclassify all broadband Internet access providers as common carriers subject to any part of Title II survives legal challenge and is left uncorrected by Congress, the FTC will be completely foreclosed from its continued enforcement of Section 5 and other important provisions of federal law, including consumer privacy protections.[5]

As FTC Commissioner Joshua Wright put it succinctly in his recent testimony before the House Committee on the Judiciary:

> Reclassifying broadband internet services as common carrier services under Title II will create further obstacles to protecting consumers and fostering competition by depriving the FTC of its long-standing jurisdiction in this area and threatening the robust consumer protection efforts that the agency has engaged in over the last two decades.[6]

This understanding of the common carrier classification is neither controversial nor partisan. FTC Commissioner Ohlhausen has said, for example, that "[i]f an entity is a common carrier providing common carrier services, we can't bring actions against them."[7] In recent testimony before the House Committee on the Judiciary, likewise, Commissioner McSweeny called for "repeal of the common carrier

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[4] *See* 15 U.S.C. 45(A) (2).

[5] Paul J. Feldman, *A First Look Inside the Net Neutrality Order*, CommLaw Blog, April 2, 2015, *available at* http://www.commlawblog.com/2015/04/articles/internet/a-first-look-inside-the-net-neutrality-order/ ("unless the courts overturn the FCC's reclassification of broadband access service, or Congress deletes the common carrier exemption, the FTC may be out of the business of enforcing privacy against broadband Internet access providers").

[6] Prepared statement of Commissioner Joshua D. Wright, Federal Trade Commission on *Wrecking the Internet to Save It? The FCC's Net Neutrality Rule*, before the United States House of Representatives, Committee on the Judiciary, March 25, 2015, *available at* https://www.ftc.gov/system/files/documents/public_statements/632771/150325wreckinginternet.pdf.

[7] See Brian Fung, *The FTC Doubles Down on its Net Neutrality Ambitions*, THE WASHINGTON POST, Sept. 29, 2014, *available at* http://www.washingtonpost.com/blogs/the-switch/wp/2014/09/29/the-ftc-doubles-down-on-its-net-neutrality-ambitions/.

exemption," which she acknowledged would otherwise "hinder the FTC from protecting consumers against unfair and deceptive common carrier activities."[8]

The practical effect of reclassification, to put it plainly, is that the FTC will no longer be empowered to police ISP practices it deems unfair or deceptive, a power many believe has been the real if implicit source of open Internet protections all along.

The FTC, as I noted in my testimony, has more experience and expertise in policing anti-competitive and anti-consumer practices, with a more flexible set of tools with which to correct market failures with a minimum of inefficient and potentially unintended negative consequences.

As Commissioner Wright said in his testimony, the FTC has until now been active in policing a number of ISP practices it considers unfair or deceptive within the context of its long history of adjudicating such complaints, utilizing a variety of regulatory and adjudicatory methods:

> The FTC has used its full range of law enforcement authority to protect consumers in the broadband sector, including obtaining injunctive relief and consumer redress where appropriate, and engaging in consumer and business education. The FTC has also pursued policy initiatives to address important consumer protection issues relating to broadband and Internet service, including requiring truthful, clear, and conspicuous disclosure of material terms of service, data security, and privacy.
>
> Importantly, the FTC has certain enforcement tools at its disposal that are not available to the FCC. Unlike the FCC, the FTC can bring enforcement cases in federal district court and can obtain equitable remedies such as consumer redress. The FCC has only administrative proceedings at its disposal, and rather than obtain court-ordered consumer redress, the FCC can require only a "forfeiture" payment.
>
> In addition, the FTC is not bound by a one-year statute of limitations as is the FCC. The FTC's ability to proceed in federal district court to obtain equitable remedies that fully redress consumers for the entirety of their injuries provides comprehensive consumer protection and can play an important role in deterring consumer protection violations.

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[8] Prepared statement of Commissioner Terrell P. McSweeny, Federal Trade Commission on *Wrecking the Internet to Save It? The FCC's Net Neutrality Rule*, before the United States House of Representatives, Committee on the Judiciary, March 25, 2015, *available at* https://www.ftc.gov/system/files/documents/public_statements/632781/mcsweeny_-_prepared_statement_us_house_judiciary_committee_-_3-25-15.pdf. *See also* Brendan Sasso, *Net Neutrality Has Sparked an Interagency Squabble Over Internet Privacy*, THE NATIONAL JOURNAL, March 9, 2015, *available at* http://www.nationaljournal.com/tech/the-future-of-broadband/net-neutrality-has-sparked-an-interagency-squabble-over-internet-privacy-20150309.

The FTC has done some remarkable consumer protection work in the broadband sector and, since the advent of the Internet, the FTC has been the primary federal agency identifying problematic practices relating to deceptive advertising, privacy and data security, as well as enforcement actions designed to stop these practice sand to deter others from adopting similar practices that harm consumers.

Before reclassifying broadband services under Title II, and thereby outside the reach of the FTC, it is important to consider the ramifications of depriving broadband consumers of the FTC's specialized enforcement abilities as well as its accompanying decades of expertise.

A few recent enforcement efforts illuminate the types of protections consumers would lose with reclassification.

For example, the FTC recently filed an action against AT&T in federal district court, charging that AT&T failed to adequately disclose to its customers on unlimited data plans that, if they reach a certain amount of data use in a given billing cycle, AT&T reduces –or "throttles"–their data speeds to the point that many common mobile phone applications –like web browsing, GPS navigation and watching streaming video –become difficult or nearly impossible to use.

The FTC complaint further alleges that, even as unlimited plan consumers renewed their contracts, the company still failed to inform them of the throttling program. When customers canceled their contracts after being throttled, AT&T charged those customers early termination fees, which typically amount to hundreds of dollars.

The FTC also brought and settled a nearly identical case against Tracfone, the largest prepaid mobile-provider in the U.S. In that case, Tracfone agreed to pay $40 million to the FTC for consumer redress to settle charges that it deceived millions of consumers with its promises of "unlimited" data service.[9]

As Commissioner Wright noted in his testimony above, as a result of the FCC's categorical ban on blocking, throttling, and paid prioritization, the FTC will also be precluded from continuing its application of antitrust law based on standards and practices developed over the last century. As Commissioner Wright warns, the FCC's categorical bans will introduce "false positives"—that is, bans on practices that actually result in consumer benefit.[10]

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[9] Prepared statement of Commissioner Joshua D. Wright, Federal Trade Commission on *Wrecking the Internet to Save It? The FCC's Net Neutrality Rule*, before the United States House of Representatives, Committee on the Judiciary, March 25, 2015, *available at* https://www.ftc.gov/system/files/documents/public_statements/632771/150325wreckinginternet.pdf.

[10] *Id.*

It is ironic that in urging the Title II approach, the FCC not only introduced considerable legal uncertainty but effectively cut off the authority of the agency best suited to ensure continued protection of the open Internet, as it had been doing all along. The practices that inspired reclassification were already subject to enforcement by the FTC, and the FTC had been doing an efficient and effective job, if only too modestly to be recognized as such by the FCC and the White House[11].

The Honorable Gus Bilirakis

1. Mr. Downes, as an advisor to start-ups and new entries in this space, can you explain how the agility of the market could change under Title II?

What will small or budding internet based businesses have to worry about or comply with next week under Title II that you don't have to today?

As I noted in my recent article analyzing the legal case against the Title II order, its scope is breathtaking, encompassing not just large facilities-based ISPs but potentially every participant in the Internet ecosystem, including small ISPs, municipal broadband providers, equipment providers, content delivery networks, backbone providers, transit providers, and even Internet content and other service providers.[12]

The reach of this radical transformation of U.S. communications law, done entirely without Congress's input, has the potential to remake every relationship in the ecosystem today.

The FCC, to use Chairman Wheeler's own words, has appointed itself the "referee on the field" for the Internet.[13] But even with the best of intentions, it should be obvious that a slow-moving federal agency, applying rules and procedures leftover from the beginning of the Industrial Revolution, will at the very least slow down the pace of innovation for this remarkable engine of disruption, vastly reducing its agility—the source to date of unquestioned U.S. competitive advantage in the information revolution.

A few examples of how this new regime will interfere with what has long been the bastion of "permissionless innovation" should make clear just how intrusive the FCC's "refereeing" will be:

> **Revised definition of PSTN now includes every service that utilizes an IP address** - Since the Communications Act explicitly prohibited the FCC from applying Title II to mobile broadband services, the order cynically gets around that hard stop by "redefining" the Public Switched Telephone Network, which is subject to Title II, to include a second network—the Internet. As a

[11] The FCC's Title II Report and Order makes no reference to the FTC's common carrier exemption and the impact of "reclassification" on on-going efforts at its sister agency, for example.

[12] *See* Larry Downes, *On Net Neutrality, the Six Ways the FCC's Public Utility Order Will Lose in Court,* FORBES, April 8, 2015, *available at* http://www.forbes.com/sites/larrydownes/2015/04/08/on-net-neutrality-six-ways-the-fccs-public-utility-order-will-lose-in-court/.

[13] Statement of Chairman Tom Wheeler, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, REPORT AND ORDER ON REMAND, DECLARATORY RULING, AND ORDER, FCC 15-24, March 12, 2015.

result of this audacious maneuver, any "service" that "uses" IP addresses is now subject to Title II. Every component from one end of the Internet to another has now been transformed into a telephone service, subject to any or all of the old rules at the whim of the FCC.

General Conduct rule - One of many sweeping changes not mentioned in the initial Notice of Proposed Rulemaking was the introduction of a "flexible" general conduct rule, which states:

> Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.

The meaning of this vague new conduct standard will be developed through adjudication, based on complaints filed by any party who believes themselves to be a victim of unreasonable interference or disadvantage. To aid its enforcement bureau, however, the Report and Order provides multiple factors to consider in evaluating complaints. But these factors clarify nothing—instead, they add to the uncertainty.

Even the Electronic Frontier Foundation, which strongly encouraged the FCC to pursue the Title II path, was deeply disturbed by the ambiguity and uncertainty this new rule would introduce:

> Unfortunately...the general conduct rule will be anything but clear. The FCC will evaluate "harm" based on consideration of seven factors: impact on competition; impact on innovation; impact on free expression; impact on broadband deployment and investments; whether the actions in question are specific to some applications and not others; whether they comply with industry best standards and practices; and whether they take place without the awareness of the end-user, the Internet subscriber.
>
> There are several problems with this approach. First, it suggests that the FCC believes it has broad authority to pursue any number of practices—hardly the narrow, light-touch approach we need to protect the open Internet. Second, we worry that this rule will be extremely expensive in practice, because anyone wanting to bring a complaint will be hard-pressed to predict whether they will succeed. For example, how will the Commission determine "industry best standards and practices"? As a practical matter, it is likely that only companies that can afford years of litigation to answer these questions will be able to rely on the rule at all. Third, a multi-factor test gives the FCC an awful lot of discretion, potentially giving an unfair advantage to parties with insider influence.[14]

[14] Electronic Frontier Foundation, *Dear FCC: Rethink the Vague 'General Conduct' Rule*, Feb. 24, 2015, *available at* https://www.eff.org/deeplinks/2015/02/dear-fcc-rethink-those-vague-general-conduct-rules.

Interconnection - Despite the fact that Chairman Wheeler had repeatedly insisted the order would have nothing to do with the backend ("peering is not a net neutrality issue") the order includes new regulation for every node in the Internet's architecture. As the order notes at Paragraph 29:

> As discussed below, we find that broadband Internet access service is a "telecommunications service" and subject to sections 201, 202, and 208 (along with key enforcement provisions). As a result, commercial arrangements for the exchange of traffic with a broadband Internet access provider are within the scope of Title II, and the Commission will be available to hear disputes raised under sections 201 and 202 on a case-by-case basis: an appropriate vehicle for enforcement where disputes are primarily over commercial terms and that involve some very large corporations, including companies like transit providers and Content Delivery Networks (CDNs), that act on behalf of smaller edge providers.

Yet when it comes to interconnection, peering, and other backend traffic management in particular, the order acknowledges that the agency has no experience or expertise "refereeing" the thousands of private agreements that networks make with each other to exchange traffic. That is no surprise—as I noted in my testimony, according to the OECD, over 99% of such agreements are so straightforward they aren't even reduced to writing.[15]

To overcome its lack of experience, the agency simply announces it will work out the details of its newly self-granted powers over time, as complaints come in. One can imagine in the future that any time traffic exchange negotiations between two parties—a CDN and an ISP, or a dominant edge provider and an ISP—become stuck or break down, one of the parties will simply file a complaint with the FCC, or threaten to do so, rather than continue negotiating.

"The best approach," the FCC says, "is to watch, learn, and act as required, but not intervene now, especially not with prescriptive rules." That's a process "that is sure to bring greater understanding to the Commission." But that "greater understanding" will come at a profound price to the Internet ecosystem, leaving every provider of Internet services unsure as to whether or not its commercial arrangements old and new with other providers does or does not satisfy the FCC's evolving understanding of "just and reasonable" practices.

Advisory Opinions - If a service provider is uncertain whether or not a new service will satisfy the FCC's evolving standards, the FCC notes at Paragraph 36, they may apply for an advisory opinion or seek guidance from a newly-created open Internet ombudsperson. But the order "declines to establish any firm deadlines to rule on them or issue response letters." The

[15] Rudolf Van Der Berg, *Internet Exchange Traffic: Two Billion Users and it's Done on a Handshake*, OECD, Oct. 22, 2012, *available at* http://oecdinsights.org/2012/10/22/internet-traffic-exchange-2-billion-users-and-its-done-on-a-handshake/

> advisory opinions, moreover, are simply that—advisory. They are not binding on the enforcement of any future complaint, and may be withdrawn at any time.

Again, these are just some of the new delays, expenses, and uncertainties that will be introduced into what has been until now a model for efficient entrepreneurship. It is not clear to whom the new rules apply or how they will be enforced. The FCC makes no promises about the speed with which its already over-burdened enforcement staff will process complaints, and leaves open to any aggrieved party—including disappointed business partners, consumers, and class action lawyers—the opportunity to bring a complaint to enforce any of the rules.

Given the heavy reliance on forbearance, entities with no previous experience operating under Title II or any other public utility law will suffer a steep learning curve and an expensive legal bill, with specialized counsel being required. And the agency's frequent reminder that multiple provisions of Title II and 700 existing Title II rules are being forbeared from only "at this time" or "for now" leaves open the very real possibility that the agency will, at any point in the future, change its mind about its cynically-described "light touch" approach to "modernizing" public utility law.

In short, new start-ups will have to worry about all of this, and more—they will have to worry about every aspect of Title II that is currently not being applied but which could be, and which could extend to any enterprise offering a "service" that utilizes IP addresses—in short, to any participant in the Internet ecosystem.

They won't know what new rules or practices they will have to comply with until the agency decides through its complaint what behaviors are and are not acceptable and by whom. Even then, the general conduct rule is there to adapt to changing conditions, rendering the possibility that practices adjudicated as acceptable today will not be tomorrow.

And the possibility of shifting policy goals leading to changing forbearance decisions leaves open the possibility that everything will change, at any time, based only on the FCC's unstated view of changing conditions—a view that is not supported, as in the Report and Order, by any form of cost-benefit analysis.

And all of this on the FCC's timetable, subject to limited budget, intentionally slow-moving administrative processes, and the availability of multiple levels of appeal.

In effect, the order has for no particular reason changed the speed limit on the Internet from 55 to 5, but has yet to hire highway patrol officers to police its arbitrary new rule or establish how, when or where they will be enforced.

That leaves start-ups—who are by definition companies that are bent on breaking the existing rules of business—with little choice but to continue driving at the same speed, now looking over their shoulder

at every moment for the more-or-less random chance of being caught and possibly having their licensed permanently revoked.