

NET NEUTRALITY AND THE ROLE OF ANTITRUST

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BEFORE THE
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COMMERCIAL AND ANTITRUST LAW
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<http://docs.house.gov/meetings/JU/JU05/20171101/106572/HHRG-115-JU05-20171101-SD004.pdf>

Statements, Letter, and Testimony submitted by the Honorable David Cicilline, Rhode Island, Ranking Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, Committee on the Judiciary. These materials are available at the Committee and can be accessed on the Committee Repository at:

<http://docs.house.gov/meetings/JU/JU05/20171101/106572/HHRG-115-JU05-20171101-SD003.pdf>

Article submitted by the Honorable Pramila Jayapal, Washington, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, Committee on the Judiciary. These materials are available at the Committee and can be accessed on the Committee Repository at:

<http://docs.house.gov/meetings/JU/JU05/20171101/106572/HHRG-115-JU05-20171101-SD005.pdf>

NET NEUTRALITY AND THE ROLE OF ANTITRUST

WEDNESDAY, NOVEMBER 1, 2017

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND
ANTITRUST LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:00 a.m., in Room 2141, Rayburn House Office Building, Hon. Tom Marino [Chairman of the Subcommittee] presiding.

Present: Representatives Marino, Goodlatte, Farenthold, Issa, Collins, Buck, Ratcliffe, Gaetz, Handel, Cicilline, Conyers, Johnson of Georgia, Eric Swalwell, Jayapal, and Schneider.

Staff Present: Ryan Dattilo, Counsel; Slade Bond, Minority Counsel; and Andrea Woodard, Clerk.

Mr. MARINO. Good morning. The Subcommittee on Regulatory Reform, Commercial, and Antitrust Law will come to order. Without objection, the Chair is authorized to declare recesses of the Committee at any time. We welcome everyone to today's hearing on "Net Neutrality and the Role of Antitrust", and I now recognize myself for an opening statement.

The Federal Communications Commission and its new Chairman, Ajit Pai, are in the process of evaluating what is the proper way to protect consumer welfare and support innovation in the Internet marketplace. We are here today to examine the role of antitrust law in that debate.

The Internet has been an overwhelmingly positive development for our country by spurring innovation, creating jobs, and establishing a dynamic marketplace for goods and ideas. All branches of our government should strive to protect the unimpeded growth of the Internet so that consumers and our economy can continue to reap its benefits.

I strongly believe, however, that actions should be taken to prevent discriminatory and anticompetitive conduct from occurring in the Internet marketplace. The question at hand today is what role should antitrust laws and the Federal Trade Commission, which helps to enforce those laws, play in preventing and policing this type of conduct. Antitrust law has a number of benefits we should consider.

Antitrust law and the standards applied by the courts have developed, evolved, and been refined over decades. This stands in contrast to the regulations imposed under the previous FCC's 2015 Open Internet Order, which can be interpreted and enforced by a constantly rotating commission, and the judicial interpretation of which is uncertain. Antitrust law uniformly applies to all participants in the Internet marketplace.

In contrast, the 2015 order's regulations only apply to Internet service providers. Antitrust law deters and, as necessary, can be used to prosecute conduct once it occurs and determine on a case-by-case basis whether a violation has occurred. This allows for flexibility and pro-consumer innovation. The 2015 Order applies a "one-size-fits-all" approach, imposing a burden on all regulated parties, regardless of whether they actually engaged or may want to engage in improper conduct, and discouraging potential innovation.

The impact of today's discussion is significant. Consider, for example, the case of rural broadband. Because rural areas of America tend to be sparsely populated, satellite and fixed-wireless technologies are often used to deliver Internet access to rural customers. These technologies are costly, and consequently often involve strict data caps. A practice known as "zero-rating," or the exemption of certain data uses from consumers and customers' data caps helps to address these concerns through competition and innovation, lowering prices, and improving service for customers. Yet under the 2015 Order, this consumer welfare-enhancing competition was almost stopped.

Consider also the case of differentiated broadband plans. When American families buy groceries, they have the choice of purchasing food from the local supermarket or from a high-end organic retailer like Whole Foods. Families who just want the basics or are on a limited income, are not forced to subsidize the preferences of shoppers with higher-end preferences.

But because of the FCC's rigid net neutrality rules, broadband consumers do not have the same flexibility. Under the guise of equal access, those who use the Internet sparingly—often, the poor and elderly—are forced to subsidize their more affluent high-bandwidth-consuming neighbors' broadband bills. Let's also consider the future of the Internet.

5G, the next generation of mobile broadband, will deliver speeds far surpassing today's LTE technologies as well as the speeds of many American's home broadband connections. 5G promises not only to advance competition in the mobile wireless industry but also to connect a new array of "Internet of Things," or "IoT" devices, such as network-connected agricultural monitoring devices, autonomous vehicles, and medical monitoring devices. 5G delivers on these promises by utilizing technologies that prioritize certain network uses that require extreme responsiveness. Innovations in telehealth, remote medical device monitoring, or communications amongst autonomous vehicles will all benefit from prioritized connections. Yet under the 2015 Order, such innovation might be stopped by the regulatory overreach of a future administration.

I look forward to hearing the testimony of today's witnesses on the potential benefits, or, if relevant, limitations of using antitrust

law to protect consumers and innovation in the Internet marketplace.

The Chair now recognizes the Ranking Member of the Subcommittee on Regulatory Reform, Commercial, and Antitrust law, Mr. Cicilline of Rhode Island, for his opening statement.

Mr. CICILLINE. Thank you, Mr. Chairman, and thank you for calling this hearing today. Welcome to our witnesses. Today's hearing is an opportunity to examine whether antitrust enforcement is an effective and responsive substitute for the clear bright-line consumer protections established by the 2015 Open Internet Order.

When working families pay their bill for broadband Internet access, they expect to get what they pay for: access to the entire lawful Internet, not just portion of it, at the speed they pay for. Without these protections, broadband providers could slow down consumers' Internet speeds to certain websites, require payments by third parties to speed traffic to consumers, or block certain websites altogether. To be clear, these concerns are firmly grounded in reality.

As the United States Court of Appeals for the D.C. Circuit observed in 2014, it is, and I quote, "common sense economic reality" that broadband providers have powerful incentives to require fees from edge providers to prioritize customer speeds and discriminate against certain types of traffic.

Consequently, as the court noted, this behavior threatens Internet openness in ways that would ultimately inhibit the speed and extent of future broadband deployment. Importantly, these protections do not apply to reasonable management of networks by Internet service providers to ensure that their consumers have the fastest and most reliable Internet speeds possible.

Moreover, and this is a fundamental point, these protections do not apply to specialized services, like heart monitors, energy consumption sensors, or voice services, which are entirely outside the scope of the 2015 Open Internet Order because they are not a former broadband Internet access service for consumers. Under the Trump administration, the Federal Communications Commission is considering whether to abolish or substantially revise these protections.

According to the Commission's notice of proposed rulemaking, the proposed rule seeks to, and I quote, "reverse the decline in infrastructure investment, innovations, and options for consumers" and address the concerns of broadband providers with regulatory uncertainty.

The Supreme Court has long held, however, that the Commission cannot simply rescind rules, but instead must examine the relevant data and articulate a rational connection between relevant facts and its deregulatory actions.

Notwithstanding the Commission's claims that our current net neutrality protections have undermined broadband deployment and adoption, the U.S. Court of Appeals for the D.C. Circuit has held twice in the past 3 years that Internet openness fosters innovation and leads to the expansion and improvement of broadband infrastructure. Unless the Commission is able to explain why it has ignored this data showing the causal relationship between strong net neutrality protections and broadband investment, its actions are

likely to be arbitrary and capricious under the Administrative Procedures Act.

Turning to the subject of today's hearing, there is substantial uncertainty concerning the application of the antitrust laws to discriminatory conduct by broadband providers. First, it is unclear that the Federal Trade Commission has authority to enforce the antitrust law against common carriers, which are exempted under section 5 of the FTC Act, even where a carrier is acting as a broadband provider. This exact question is before the ninth circuit in an en banc review of its prior ruling that the FTC does not possess this authority.

Secondly, to the extent that the Federal Trade Commission even has the authority over common carriers, there is no evidence that antitrust enforcement is a substitute for bright-line rules to ensure openness. The Commission's proposal does not address or even ask this question, while the Federal Trade Commission's 2007 report on broadband connectivity and competition policy does not provide clear guidance on whether paid prioritization blocking or throttling are cognizable harms under the antitrust laws.

The point is underscored by bipartisan legislation introduced by Chairman Goodlatte in 1999 and Chairman Sensenbrenner in 2006, which each would have made discriminatory conduct by broadband providers an antitrust violation tacitly recognizing that this conduct does not violate the antitrust laws today. And finally, as Professor Tim Wu has previously testified before this Subcommittee, the type of economic analysis that antitrust enforcement relies upon does not reflect diffuse but important values, like speech or a healthy economy.

In other words, it is virtually impossible for antitrust enforcement to protect against the full array of discriminatory conduct prohibited by the Open Internet Order. Before closing, I want to make a moment to note that a primary goal of preserving Internet openness is to prevent Internet gatekeepers from choosing the content that consumers are able to see online or balkanizing the Internet.

Today, there is increasing concern that some platforms have abused their dominance to stifle innovation, undermine privacy, and divert readers and advertising revenue away from trustworthy sources of news and information, as the Open Markets Institute recently observed in a letter to the FTC. I have previously requested that the Committee hold a hearing to examine the effects of platform dominance on consumers, innovations, and workers to ensure that the antitrust laws are working effectively, and I renew that request today.

As I have said before, we cannot retreat from hard conversations about new issues. I again thank the Chairman for calling today's hearing and look forward to the testimony of our esteemed panel of witnesses. And I yield back.

Mr. MARINO. Thank you. The Chair recognizes the Chairman of the full Judiciary Committee, Mr. Goodlatte from Virginia for his opening statement.

Chairman GOODLATTE. Thank you, Mr. Chairman. And I very much appreciate your holding this very important hearing today. Actually, today's hearing marks the seventh hearing over the past

decade that the Judiciary Committee has held on the topic of net neutrality. The significant amount of time and effort devoted to this topic evidences the need for a more permanent solution. Fortunately, the FCC, under the leadership of newly-confirmed Chairman Ajit Pai, is taking actions to help steer us in that direction.

On May 18, 2017, 2 years after the Obama administration's FCC imposed the Open Internet Order, the current FCC adopted a Notice of Proposed Rulemaking ("NPRM") to reexamine the regulatory framework established by the 2015 Order. The NPRM proposes, among other things, to reverse the decision of the Obama administration's FCC to reclassify broadband Internet access service as a telecommunications service under the Communications Act of 1934. The NPRM also requests comment on whether to keep, modify, or eliminate certain "bright-line rules" adopted in the 2015 Order and whether regulatory intervention in the Internet service provider market is necessary. Finally, the NPRM proposes to eliminate the "general Internet conduct standard," which gives the FCC significant discretion to prohibit any ISP practice that it believes runs afoul of a non-exhaustive list of factors.

The Internet that existed before the 2015 Order was dynamic, competitive, open, and free. By raising costs, imposing heavy regulatory burdens, introducing significant regulatory uncertainty, and instituting government meddling into nearly every aspect of the Internet, the Obama administration's FCC seriously undermined the Internet's competitive nature.

The Obama administration's FCC argued, under the guise of "net neutrality," that imposing blanket regulation on the Internet marketplace is needed to encourage competition and promote a "virtuous cycle" of broadband use, innovation, and investment. I am deeply skeptical of these claims.

In my experience, regulation generally stifles, rather than facilitates, competition and innovation. In fact, it is my belief that the Internet flourished precisely because it developed in a less regulated market. That is not to say that we should stand by and allow companies to engage in discriminatory or anticompetitive activities. Rather, I believe that the principles of "net neutrality" can be best achieved through the vigorous application of our Nation's antitrust laws and, at most, a much lighter-handed regulatory approach than that contained in the 2015 Order.

Strong enforcement of our antitrust laws can prevent dominant Internet service providers from discriminating against competitors' content or in engaging in anticompetitive pricing practices. Supporters of net neutrality have voiced particular concerns over vertical agreements or mergers between Internet service providers and related businesses. Many experts acknowledge that these vertical agreements could possibly lead to anti-competitive conduct that could potentially harm consumers. In extreme cases, these arguments could eventually block downstream products, degrade services, and lead to higher prices for American families. I strongly agree that these anti-competitive practices should be aggressively deterred and punished.

Yet, it is in these specific areas that the FTC has the relevant expertise and the most robust toolbox to address anticompetitive activities. Blanket regulation, by contrast, would deny consumers

the potential benefits in cost savings and improved services that may result from vertical agreements.

Furthermore, antitrust laws can be applied uniformly to all Internet market participants, not just to Internet service providers, to ensure that improper behavior is policed uniformly across all corners of the Internet marketplace.

The House Judiciary Committee conducted previous hearings last Congress, examining whether antitrust law or regulation is more effective at protecting consumers and innovation on the Internet. And witnesses testified strongly in support of applying antitrust law.

Given the NPRM being considered by the FCC, it is essential that we continue this conversation as we search for a more permanent solution to this issue that provides for the flexibility to drive innovation and consumer welfare.

Ultimately, I am open to the idea of amending the antitrust laws, if necessary, to account for the characteristics of the Internet. I will continue to use the House Judiciary Committee's jurisdiction over our Nation's antitrust laws and enforcement agencies in order to protect an open Internet and ensure that the Internet continues to flourish in a competitive deregulatory environment.

Today's hearing will demonstrate the significant support for reversing the 2015 Order and returning to a less-intrusive regulatory state in which the antitrust laws and the Federal Trade Commission play a significant role in addressing harmful conduct.

I look forward to hearing today's testimony on the role of antitrust laws in creating a permanent solution to the net neutrality debate that has been raging for over a decade. And I yield back. Thank you, Mr. Chairman.

Mr. MARINO. Thank you. The Chair recognizes the Ranking Member of the full Judiciary Committee, Mr. Conyers of Michigan, for his opening statement.

Mr. CONYERS. Thank you, Chairman Marino. And top of the morning to all of our witnesses and members here, including the son of one of them. The Judiciary Committee has a central role in studying the issue of net neutrality and, more generally, competition on the Internet. As the Committee considers today the specific question of whether antitrust law would be a better tool than regulation to ensure Internet competition and innovation, we should keep several factors in mind.

To begin with, failure to guarantee net neutrality is not an option. As I have previously observed at prior hearings on this topic, and I do not want to give my seniority away, but in 2008, 2011, 2014, 2015, there are many areas in the United States where consumers have the choice of only one or two broadband Internet service providers. As a result, these broadband providers effectively function as monopolies or duopolies, let's face it.

Their control over the broadband access market gives them the incentive and ability to provide differential treatment of content, depending on factors like how much a content provider pays or whether the broadband provider also offers competing content. Such discrimination can lead to less consumer choice, less innovation, higher costs, and more power to control the flow of information and ideas in the hands of fewer broadband providers. Enforce-

ment of existing antitrust laws as the exclusive or primary means of ensuring an open Internet, however, would be insufficient.

Under current antitrust law, there is relatively little that regulators can do outside the merger review context to address the conduct of a regulated industry, such as broadband Internet service, with respect to enforcing net neutrality principles. Through a series of decisions, the Supreme Court has limited the potential to successfully pursue claims under the Sherman Antitrust Act with respect to net neutrality.

In addition, antitrust enforcement alone would be a cumbersome, more limited, more resource-intensive, and after the fact way than regulation to develop a regulatory regime for net neutrality. Moreover, antitrust law is not sufficiently broad in scope, as it fails to address the noneconomic goals of net neutrality, including the promotion of innovation and the protection of free speech and political debate.

Now, while I welcome the recent efforts of some progressives to restore the original understanding and purpose of antitrust law to better account for the political implications of the excessive concentration of corporate power, antitrust law, nonetheless, will remain a necessary but insufficient tool with respect to ensuring net neutrality. In light of the foregoing, the Federal Communications Commission's 2015 Open Internet Order provides a strong and vital set of rules for ensuring an open Internet, and the Commission should not rescind it.

Rules to address net neutrality have the benefit of addressing potential threats to an open Internet before they fully materialize. Additionally, having a set of best practices enshrined in rules would provide certainty for the industry. I am particularly pleased that the Open Internet Order contains key provisions that many others like myself have long called for, including a rule preventing broadband providers from blocking or throttling Internet access or from imposing paid prioritization of Internet traffic and prohibition on any other practices that unreasonably interfere with or disadvantage users' ability to access broadband service or lawful content applications or services.

These measures are the best way to protect the virtuous cycle of innovation which net neutrality fosters and which ensures both competition and innovation among broadband and content providers to the ultimate benefit of consumers. I thank Chairman Marino for holding this hearing, and I look forward to our witnesses' testimony today. Thank you, Mr. Chairman.

Mr. MARINO. Thank you. Without objection, other members' opening statements will be made part of the record.

Statement submitted by the Honorable Henry C. "Hank" Johnson, Jr., Georgia, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, Committee on the Judiciary. This material is available at the Committee and can be accessed on the Committee Repository at: <http://docs.house.gov/meetings/JU/JU05/20171101/106572/HHRG-115-JU05-MState-J000288-20171101.pdf>.

Mr. MARINO. I will begin by swearing in our witnesses before we introduce them. If you would please all rise, and raise your right hand.

Do you swear that the testimony you are about to give before this Committee is the truth, the whole truth, and nothing but the truth, so help you God?

Let the record reflect that all of the witnesses have responded in the affirmative. Please be seated, and thank you.

I am going to introduce all of the witnesses before we start with your opening statements. Maureen K. Ohlhausen was sworn in as Commissioner of the Federal Trade Commission on April 4, 2012 and was designated as Acting Chairman by President Donald Trump in January 2017.

Prior to joining the Commission, Ohlhausen was a partner in Wilkinson Barker Knauer, LLP, where she focused on FTC issues, including privacy, data protection, and cybersecurity. Ms. Ohlhausen previously served at the Commission for 11 years, most recently as Director of the Office of Policy Planning from 2004 to 2008, and she led the FTC's Internet access taskforce. Ms. Ohlhausen was also Deputy Director of that office.

From 1998 to 2001, she was an attorney advisor for former FTC Commissioner, Orson Swindle, advising him on competition and consumer protection matters. Before coming to the FTC, Ms. Ohlhausen spent 5 years at the U.S. Court of Appeals for the D.C. Circuit serving as a law clerk for Judge David B. Sentelle and as a staff attorney.

She also clerked for Judge Robert Yock of the U.S. Court of Appeals Claims from 1991 to 1992. Ms. Ohlhausen graduated with distinction from Antonin Scalia Law School, George Mason University in 1991 and graduated with honors from the University of Virginia in 1984. Commissioner, thank you for being here.

Michael Romano is the Senior Vice President of Industry Affairs and Business Development at NTCA Rural Broadband Association, where he oversees public policy advocacy, industry affairs, business opportunities, and community outreach efforts for the trade association on behalf of several hundred rural telecom operator members.

Prior to working with NTCA, Mr. Romano was general counsel with the firm Bingham McCutchen LLP, representing telecommunication carriers and other service providers in regulatory rulemaking and adjunctive proceedings and civil and administrative litigation.

He has also worked with Global Telecom and Technology, formerly Global Internetworking as vice president and General Counsel, and at other tech companies, such as America Online and Level 3 Communications. Mr. Romano was also an associate at the firm of Swidler Berlin LLP, representing clients in regulatory processings for State regulators in the Federal Communications Commission and in contract negotiations with other industry operators. Mr. Romano earned his B.A. from Middlebury College and his J.D. from Georgetown University Law Center. Welcome, sir.

Terrell McSweeney currently serves as Commissioner to the FTC. Prior to her appointment to the Commission by President Obama, Commissioner McSweeney served as Chief Counsel for the Competition Policy and Intergovernmental Relations Department with the Antitrust Division of the Department of Justice. Commissioner McSweeney also served as Senior Advisor to President Obama and

Vice President Biden, Deputy Chief of Staff to then-Senator Biden, and counsel to the Senate Judiciary Committee.

She also worked in private practice at the firm of O'Melveny and Myers. Commissioner McSweeney earned her bachelor's degree from Harvard University and her J.D. from Georgetown University School of Law.

Robert McDowell is a partner with the firm Cooley LLP, where he specializes in regulatory communication mergers and acquisitions and telecommunications and wireless technology. Prior to joining Cooley, Mr. McDowell served as a Commissioner of the Federal Communications Commission, the FCC, for 7 years. He was first appointed by President George W. Bush in 2006 and again by President Obama in 2009.

At the FCC, Mr. McDowell led efforts to expand consumer access to spectrum through his work on the two largest wireless auctions in the U.S. history at the time. He played a key role in 2009 digital television transition, and led efforts to establish the first Federal Civil Rights rule in a generation by creating a ban on racially discriminatory practices in broadcast advertising.

He also helped oversee several large and complex mergers including SiriusXM and Comcast NBCUniversal. Prior to serving with the FCC, he was senior vice president for CompTel, the Competitive Telecommunications Association. Mr. McDowell earned his B.A. with honors from Duke University and his J.D. from William and Mary Law School. And I know that he has some very competent backup with him sitting behind him, his son. So, welcome.

Each of the witnesses' written statements will be entered into the record in its entirety. I ask that each witness summarize his or her testimony in 5 minutes or less. To help you stay within that time, there is a timing light in front of you. The light will switch from green to yellow indicating that you have 1 minute to conclude your testimony. And when the light turns red, it indicates that the witnesses' 5 minutes have expired.

I want to thank you witnesses for being here, and the Honorable Ms. Ohlhausen, please.

STATEMENTS OF MAUREEN K. OHLHAUSEN, ACTING CHAIRMAN, FEDERAL TRADE COMMISSION; MICHAEL ROMANO, SENIOR VICE PRESIDENT, INDUSTRY AFFAIRS AND BUSINESS DEVELOPMENT, NTCA (RURAL BROADBAND ASSOCIATION); TERRELL MCSWEENEY, COMMISSIONER, FEDERAL TRADE COMMISSION; AND ROBERT MCDOWELL, FORMER COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

STATEMENT OF MAUREEN K. OHLHAUSEN

Ms. OHLHAUSEN. Chairman Marino, Ranking Member Cicilline, and members of the Subcommittee, I appreciate this opportunity to appear before you today to discuss network neutrality and the role of antitrust. Ten years ago, a bipartisan FTC approved a staff report that analyzed competition in consumer protection issues related to net neutrality and cautioned against regulation. Applying economic and antitrust analysis, our report explained that banning non-neutral behavior could harm consumers more than it helps them. Instead, the report noted that the FTC could assess whether

ISP's practices are anticompetitive, unfair, or deceptive on a case-by-case basis.

The report also recommended that ISPs clearly disclose the material terms of broadband access, particularly any traffic-shaping practices. This report remains highly relevant today, and where the evidence has changed, it shows the broadband market is more competitive than it was in 2007, strengthening the report's conclusions. More recently, FTC staff filed a comment to the FCC detailing our expertise and recommending that the FCC reclassify broadband as a title I noncommon carrier service. And I agree with that recommendation, and filed my own comment to that effect.

As the 2007 report and subsequent comments state, the FTC's antitrust and consumer protection tools help ensure that consumers can pursue their preferences, whether for prioritized services or for equal treatment of all data by ISPs. The FTC has addressed a wide range of anticompetitive behavior, including the kinds of behavior that concern net neutrality advocates.

For example, the FTC has sued companies for foreclosing rival content in an exclusionary or predatory manner, and challenged problematic access discrimination, pricing, and bundling practices. And we have conditioned vertical mergers that would have foreclosed competition in a downstream market. Antitrust enforcement, by protecting the competitive process, can promote net neutrality if that is what consumers want.

Advocates of regulation often argue that consumers value the equal treatment of data by ISPs. If so, then any ISP that systematically degrades applications and content that its subscribers demand will certainly face a backlash. On the other hand, consumers may desire and benefit from certain non-neutral ISP practices, such as streaming services bundles or prioritization of telemedicine services. Case-by-case antitrust enforcement focused on competitive harm will allow ISPs and content providers to experiment in ways that benefit consumers, while guarding against arrangements that foreclose access to edge providers.

Supporters of net neutrality regulation also commonly assert that the retail broadband market lacks competition, but measuring competition is not a simple exercise of counting how many wireline ISPs in an area provide broadband at a certain speed threshold. It requires careful product and market definitions and analysis of the disciplining effects of substitutes and potential entrants. The evidence of growing competition, such as improving speeds, the expansion of mobile broadband, and vigorous pricing competition, must also be considered when determining whether net neutrality regulation is necessary.

Like our antitrust tools, the FTC's consumer protection authority can help address concerns that consumers are not getting what they expect from their ISP. Our deception authority bans companies from offering consumers one product or service but providing them something different. And if ISPs promise to adhere to net neutrality principles, the FTC can hold them to these promises. Our deception authority also requires companies to disclose material information—for example, blocking or throttling practices—if not disclosing it would mislead a reasonable consumer.

The FTC's unfairness authority prohibits practices where the actual or likely consumer injury is substantial, unavoidable, and not outweighed by benefits to consumers or competition. The FTC has used this authority to sue companies that unilaterally violated their promises. Indeed, the FTC is currently challenging as unfair and deceptive AT&T Mobility's alleged practice of throttling wireless data plans which they advertise as unlimited.

Case-by-case enforcement against particular instances of harm to consumers or competition is the right approach when we know that a type of practice typically benefits consumers and spurs competition.

In contrast, a per se prohibition is appropriate only where we have evidence that a specific practice nearly always harms consumers without corresponding benefits. In short, the FTC has tools that are capable of protecting consumers and competition online. Thank you.

Hon. Ohlhausen's written statement is available at the Committee or on the Committee Repository at: <http://docs.house.gov/meetings/JU/JU05/20171101/106572/HHRG-115-JU05-Wstate-OhlhausenM-20171101.pdf>.

Mr. MARINO. Thank you. Mr. Romano.

STATEMENT OF MICHAEL ROMANO

Mr. ROMANO. Chairman Marino, Ranking Member Cicilline, and members of the Subcommittee, thank you for the chance to offer the perspective of small, rural broadband network operators on agency roles and governance related to broadband. I am Mike Romano, Senior Vice President of NTCA, the Rural Broadband Association.

Our nearly 850 members serve the most rural parts of the U.S., less than 5 percent of the U.S. population, spread across more than 35 percent of the U.S. land mass. On average, they employ a few dozen people.

Nonetheless, these small, hometown businesses strive to deploy networks that position rural America for success in a broadband world. Any small business can talk to the perils of ambiguous and heavy handed regulation, but for rural broadband operators in particular, time and resources needed to comply with the complex rules can hinder efforts to fulfill a statutory mandate for universal service, ensuring that every American, no matter where they live, has access to services reasonably comparable in price and quality to those in urban areas.

At the same time, the capital-intensive nature of rural telecom makes regulatory certainty essential. Finding a steady balance in any framework is critical to promote and sustain rural broadband. This requires a division of labor between agencies based upon clear statutory constructs, core competencies, and expertise. Thus, even as NTCA has urged rules of the road to enable and sustain rural broadband, we have expressed concern about rules that may reach too far or be used as a platform for yet more rules to come.

To this end, NTCA did not support retail broadband regulation by the FCC leading up to the Open Internet Order. We advocated, instead, for a different regime that would have targeted oversight of interconnection between the underlying networks. We had hoped

the 2015 Open Internet Order might adopt a limited approach like we advocated, but it did not. Instead, the order imposed complex and escalating obligations only upon retail broadband providers, despite the dynamic, multisided nature of the broadband ecosystem.

Beyond questions of burden and the one-sided nature of the rules, the value of some of the rules adopted in 2015 remains unclear. For example, NTCA argued that new sector-specific privacy rules to govern custody and the use of data would only burden retail broadband providers and confuse customers, given other firms have control of the same data subject to different rules.

For these reasons, NTCA was grateful when the FCC and Congress earlier this year put brakes on certain of the rules. Our Nation now has an important opportunity to reset and to establish a more appropriate division of labor, based, again, upon clear statutory constructs, core competencies, and agency expertise.

NTCA submits that consumer broadband protection and retail marketplace competition issues are better overseen by the FTC, which is well-versed in such matters in the oversight of mass market services generally than by the FCC. Placing these responsibilities with the FTC, pursuant to its statutory mandates, can help avoid the kinds of concerns I described moments ago. But other distinct statutory provisions are important to keep in mind too, as our Nation considers next steps with respect to promoting the use of broadband.

Of particular significance to rural America is the separate statutory mandate for universal service. The ongoing importance of promoting universal service in a broadband world must be sustained in any regulatory transitions to come. To help fulfill this statutory mandate, NTCA has highlighted the need to ensure that underlying networks interconnect and exchange data. A targeted focus by the FCC on such matters would be in sharp contrast to retail broadband services that have been the subject of sweeping regulatory attention to date.

A network-focused framework need not, and indeed must not, interfere with a dynamic retail broadband marketplace. It must not transform into new net neutrality rules, creep into retail regulation, or erect ex-ante obligations that hinder innovation. This, in fact, was one of our primary concerns with the Open Internet Order in that the new rules looked very different than even the title II based frameworks under which our members had operated for years as historical telephone companies.

But representing networks that sit hundreds of miles away from potential interconnection points and have already faced connectivity challenges in other contexts, NTCA is deeply concerned about ensuring rural America gets and stays connected with the rest of the broadband world, consistent with the goals of universal service.

NTCA submits the FCC is well-equipped by law and experience to deal with matters of interconnection specifically as a distinct and separate matter from any net neutrality considerations. We, therefore, encourage a continued role for the agency in this discrete yet critical regard, even as the FTC might soon reassume primacy with

respective to consumer protection and competition in the retail broadband marketplace.

In short, as changes are contemplated to address broadband policy, NTCA urges Congress and the FCC and FTC working in partnership to ensure that other distinct but important public policy principles, such as universal service and connectivity, are also fulfilled and sustained in a broadband world. NTCA looks forward to continuing to work with you and the agencies on behalf of our hundreds of small operator members and the millions of rural Americans they serve. Thank you.

Mr. Romano's written statement is available at the Committee or on the Committee Repository at: <http://docs.house.gov/meetings/JU/JU05/20171101/106572/HHRG-115-JU05-Wstate-RomanoM-20171101.pdf>.

Mr. MARINO. Thank you. The Chair now recognizes the Honorable Ms. McSweeney.

STATEMENT OF TERRELL MCSWEENEY

Ms. MCSWEENEY. Good morning. Thank you very much, Chairman Marino and Ranking Member Cicilline, Chairman Goodlatte, Ranking Member Conyers; a pleasure to see you and the distinguished members of the Committee. I am Terrell McSweeney. I am a commissioner at the Federal Trade Commission, but today I am speaking on behalf of myself, not the commission. I support the FCC's 2015 Open Internet Order because it establishes clear rules to protect consumers and entrepreneurs who are dependent on a few very large broadband providers that serve as the gatekeepers to the Internet.

For more than a decade, the status quo in the United States has been an open Internet that supports thriving innovation. I am proud to serve at the Federal Trade Commission, but it is wrong to assume that a framework that relies solely on backward-looking consumer protection and antitrust enforcement can provide the same assurances to innovators and consumers as forward-looking rules contained in the FCC's Open Internet Order.

While it is true that the FTC possesses a great deal of expertise in areas of antitrust and consumer protection, it does not possess specialized subject matter expertise in telecommunications, data network management practices, or in detecting instances of data discrimination. That expertise is housed at the FCC. These are very real and significant limits to the effectiveness of the FTC's tools in policing nondiscrimination on networks and protecting competition.

Moreover, antitrust tools are designed to protect competition, but broadband markets are highly concentrated. The majority of American consumers have little or no choice when it comes to wireline broadband. Competitive pressure cannot be counted on to either push ISPs to offer consumers better contract terms or quality of service or to limit discriminatory conduct.

Since most U.S. consumers are dependent on a few big players to access the Internet, the critical question, then, is whether these companies have the incentive and ability to harm consumers and competition. Both the Department of Justice and the Federal Communications Commission have recognized that they do.

For example, big broadband companies also supply video programming. That means that their revenues are directly threatened when consumers use broadband connections to access competing video providers or new entrants. It is well-established that appropriately tailored regulation can complement antitrust law in highly concentrated markets, particularly when vertically integrated incumbents have incentives to harm competitors. Absent clear rules, the detection of discriminatory conduct is costly, difficult, time-consuming, and hard to remedy.

For example, let's say you are watching streaming video, and your stream becomes slow or grainy. Is that caused by intentional data discrimination by your ISP, or might it be a server issue related to the content provider? Perhaps it is a spotty connection, or maybe it is something else entirely. How would a typical consumer know? How would the FTC?

If the FTC were to detect a possibly anticompetitive practice, antitrust enforcement requires not only detection but thorough investigation, prosecution, a potentially lengthy rule of reason analysis, and perhaps a multiyear appeals process. At the end of that process, we could not travel back in time to undo the harm that had excluded the rival or reset the competitive evolution of the marketplace. Remedy remains a serious challenge to relying on an antitrust enforcement approach.

Moreover, the premise of Internet openness is that consumers should be able to use their broadband connections to access the lawful content of their choosing. Noneconomic values, such as freedom of expression and diversity of discourse, may not be easily reached under antitrust law. Finally, the FTC's jurisdiction over common carriers remains unclear. Even if the FCC reclassifies broadband as an information service, the majority of providers will continue to provide common carrier services, and, therefore, will remain classified as common carriers.

Unless Congress repeals our common carrier exemption, we will continue to face challenges to our authority over these industries. Additionally, renovations to the FTC's authority—for example, giving it more extensive tools to protect consumer data and privacy, making sure it has the proper resources, and giving it more leeway to challenge anticompetitive measures and conduct in highly-concentrated markets—would help the Commission keep pace with changes in the economy.

Earlier this year, Congress took the unfortunate action, in my view, of repealing the FCC's broadband privacy rules, leaving consumers without important protections over how their data is used and shifting the risk from industry giants onto American families. We should not double down on this approach. This is not a situation where we have an either-or choice between clear FCC rules to protect an open Internet and FTC enforcement.

By design, the agencies have different tools, with different features. Both have a role to play when it comes to protecting consumers and ensuring an Internet that fosters innovation. Thank you.

Hon. McSweeney's written statement is available at the Committee or on the Committee Repository at: <http://docs.house.gov/>

meetings/JU/JU05/20171101/106572/HHRG-115-JU05-Wstate-McSweeneyT-20171101.pdf.

Mr. MARINO. Thank you. The Chair recognizes the Honorable Mr. McDowell.

STATEMENT OF ROBERT MCDOWELL

Mr. MCDOWELL. Thank you, Mr. Chairman. Chairman Goodlatte, Chairman Marino, Ranking Members Conyers and Cicilline, and all distinguished members of the Committee, thank you so much for having me back before your Committee today. Also, thank you for the special recognition of my aide-de-camp for the day, Cormac Augustine McDowell. It is an honor to be back here and also with this distinguished panel with Chairman Ohlhausen, Commissioner McSweeney, and Mr. Romano.

So, I am a partner at Cooley LLP, and today, I am representing Mobile Future, where I am the Chief Public Policy Advisor. Mobile Future is a coalition of cutting-edge technology and communications companies and a diverse coalition of nonprofit organizations working to support an environment that encourages investment and innovation in the dynamic wireless sector, such as with 5G and the Internet of Things.

During my 7 years as a commissioner of the Federal Communications Commission, from 2006 to 2013, I worked extensively on protecting an open and freedom-enhancing Internet, and testified before this Committee during many of the hearings that Mr. Conyers pointed out earlier.

During the course of my work, I weighed the costs and benefits of ex-ante economic regulation of these markets versus ex-post enforcement of antitrust and competition laws. Each time I examined the facts and the law, I determined that ex-post enforcement worked far better for the dynamic and fast-paced Internet market than top-down ex-ante telecom regulation drawn from antiquated statutes. I was also inspired by the FTC's unanimous and bipartisan report from 2007, which underscored the importance of avoiding unnecessary economic regulation in this space, and it prophetically warned against its likely unintended consequences.

Indeed, bipartisan and light-touch Internet policies engendered during the Clinton-Gore administration worked incredibly well, making the Internet the greatest deregulatory success story of all time. Internet technologies proliferated faster than any other disruptive technology in history and are improving the human condition more and more each day as the direct result of flexible light-touch public policy.

But in 2015, the FCC radically departed from that long-standing bipartisan light-touch consensus when it voted three to two to classify broadband Internet access as a telecom service for the first time in U.S. history. In so doing, it imposed a 1934 law designed for phones that were held in two hands onto the complex and dynamic Internet, all while stripping the Federal Trade Commission of its ability to police the broadband market due to the common carrier exemption.

As a result, investment in next-generation networks has been deterred, popular innovations, such as zero-rating offerings, have been discouraged, and the legal landscape has been thrown into a

state of confusion, especially when it comes to consumer privacy protection.

The FCC is poised to reverse that error, however. Assuming it will rescind the title II Order, consumers, entrepreneurs, innovators, and investors alike should all know that American's time-tested antitrust and competition laws stand at the ready to protect the Internet ecosphere and keep it vibrant, just as they did so well before the counterproductive 2015 Order.

Both the Department of Justice, who is not here today, and the FTC have proven themselves to be highly effective cops on the beat throughout the complex Internet economy.

Lastly, and perhaps most importantly, today it is my hope that when the FCC rescinds the title II Order, it will also reiterate that broadband Internet access is inherently an interstate service, which calls for exclusive Federal jurisdiction.

The Commission should, therefore, preempt all State and local laws attempting to regulate broadband services, including those addressing privacy. Having a byzantine patchwork of state and local laws attempting to regulate the borderless and global Internet will wreak havoc on the digital economy, suffocate investment and innovation, confuse consumers, and encourage foreign governments and multilateral international bodies to respond in kind.

Rescinding the title II Order with strong Federal preemption will simplify the regulatory landscape, provide certainty to all market players, and offer consumers one set of strong and clear Federal privacy protections administered by the one expert agency for privacy, the Federal Trade Commission. Thank you very much, and I look forward to your questions.

Hon. McDowell's written statement is available at the Committee or on the Committee Repository at: <http://docs.house.gov/meetings/JU/JU05/20171101/106572/HHRG-115-JU05-Wstate-McDowellR-20171101.pdf>.

Mr. MARINO. Thank you. We will now begin our 5 minutes of questioning, and the Chair recognizes the Chairman of the full Judiciary Committee, the gentleman from Virginia, Congressman Goodlatte.

Chairman GOODLATTE. Thank you very much, Mr. Chairman. Welcome to all of these panelists. I think you have given us excellent testimony. Mr. McDowell, let me start with you. In your testimony, you discussed the regulatory whiplash that has resulted from the 2015 Order. Can you elaborate on that description, and compare what impact an ex-post antitrust approach would have on innovation and the Internet?

Mr. McDOWELL. What we mean by that is the ex-ante regulation can be translated in the vernacular as a mother-may-I. So, if you look at popular service offerings, such as zero-rating, consumers like zero-rating. It can benefit consumers. It can cost them less money for services and products.

The FCC, initially, kind of gave a green light, or a cautious green light, that zero-rating was allowed under its 2015 Order, and then immediately after that, started to pull back from that, and question it, and wanted to see case-by-case what each offering of zero-rating entailed, whether or not they did like it. And that started to inhibit the offering of a very popular service.

So, that is part of the regulatory whiplash. And then, of course, we have this, you know, ping pong match that has gone on over the years throughout a large percentage of my career of the FCC issues an order, it goes up to the appellate courts, it comes back to the FCC, there is a surprise election, the FCC changes hands, there is going to be another order, maybe other appeals. And that is where I think it would be great for Congress to give some clarity, and ultimately, put this debate to rest.

Chairman GOODLATTE. Mr. Romano, you used the example of rural call incompleteness in your testimony to describe how certain anticompetitive conduct could also occur with respect to rural broadband providers. Can you elaborate more on those fears?

Mr. ROMANO. Thank you, Chairman Goodlatte. Yes. So, rural call completion, for those that are not familiar with it, is essentially this notion of where we have seen instances of calls failing to reach rural America, where consumers and businesses cannot receive their calls that are placed by urban consumers or businesses. We cite that as a concern of where we think that there is a need for some limited involvement by the FCC.

We have seen that in the past, the FCC has been very effective in that specific instance of where you are talking about interconnection of networks being able to delve into the problem, figure out who the actors are in the space, and helping to resolve the concern, so that service is restored. We think that is an example of the right kind of regulation, the right targeted, limited regulation that is handled on an ex-post basis, mind you, but allows somebody to jump in and be a cop on the beat, if you will, to address such concerns.

Chairman GOODLATTE. Thank you. Commissioner Ohlhausen, what improvements, if any, should be made to the antitrust laws to ensure an open and competitive Internet marketplace? Should some sort of antiblocking or throttling or prioritization standards, or even categorical bans, be enacted, in your view?

Ms. OHLHAUSEN. One of the first improvements I would recommend is to get rid of the common carrier exemption that the FTC is subject to, because I think that does create a lack of clarity. Certainly, the Department of Justice can bring enforcement actions, but I would recommend that. And then secondly, I think the antitrust laws have been able to address these kinds of behaviors in other markets.

And so, I would be interested in hearing further proposals about what kind of changes, you know, Congress thinks would be appropriate here. I certainly have been supportive of the idea of the transparency requirement that the Internet service providers are subjected to. I think that creates a very good baseline, so that they are at least clear to consumers about what traffic-shaping behavior they may be engaging in.

Chairman GOODLATTE. Thank you. And Commissioner McSweeney, critics of the antitrust law approach, such as yourself, assert that litigation can be expensive and that a resolution can take too long relative to the dispute at issue. However, how would you compare that to the expense of an FCC action or litigation under the Open Internet Order and the potential time it takes for

the FCC or courts to reach a resolution under the order? Is not that going to be an equally long and expensive process?

Ms. MCSWEENEY. Thank you for the question. I think from my perspective, I am primarily concerned about the impact of relying on an after-the-fact enforcement approach, as it relates——

Chairman GOODLATTE. I think that is critically where you and I disagree. You think you know ahead of time what you need to do to protect consumers, and I think that the dramatic competition that takes place on the Internet and new ideas is much better to figure out what consumers want, and then, let them decide, rather than you tell us ahead of time, because I think as former-Commissioner McDowell has pointed out, that has already begun to have a distortive effect on what is available on the Internet.

Ms. MCSWEENEY. I think what is really challenging is for entrepreneurs on the edge: app developers, the people who are generating the enormous demand for all of the wonderful innovation flowing from the Internet. If they cannot reach their audience, and they have to pay multiple fees——

Chairman GOODLATTE. But they can.

Ms. MCSWEENEY [continuing]. In order to connect with them——

Chairman GOODLATTE. But they can and do.

Ms. MCSWEENEY [continuing]. Then they will not be able to scale. And there is no remedy for that available to them under antitrust law.

Chairman GOODLATTE. I get that. But they can, and they do. And there is just no evidence that what you are arguing is taking place.

Ms. MCSWEENEY. Well, they can, and they do because the status quo in the United States is an open Internet.

Chairman GOODLATTE. Right. But it has been based upon free and open competition, not based upon an order that they have to look at just as much as the telecom providers have to look at, in terms of what the rules of the road are. And that is really, in my opinion, the camel's nose under the tent in terms of what the FCC will do to regulate all aspects of the Internet, not just the broadband providers. Thank you, Mr. Chairman.

Mr. MARINO. Thank you. The Chair recognizes the gentleman from Michigan, Congressman Conyers, for his questions.

Mr. CONYERS. Thank you, Mr. Chairman. I want to begin by asking unanimous consent to enter into the record a letter from the National Association of Realtors, a statement from Anant Raut, a visiting fellow on behalf of public knowledge on net neutrality and the role of antitrust, a letter from Consumer Union to you, Mr. Chairman, and Ranking Member Cicilline, and finally, a statement of four sentences by our colleague, Frank Pallone.

Mr. MARINO. Without objection.

These materials are made available at the Committee or on the Committee Repository at: <http://docs.house.gov/meetings/JU/JU05/20171101/106572/HHRG-115-JU05-20171101-SD003.pdf>.

Mr. CONYERS. Thank you. Commissioner McSweeney, please could you discuss with us the limitations of antitrust law in enforcing net neutrality principles? That is why we are here.

Ms. MCSWEENEY. Yes. I think setting aside the jurisdictional question that we have been discussing about whether the FTC even has appropriate jurisdiction under its statute, there are some real

challenges associated with relying on an antitrust enforcement approach because this conduct may be difficult to detect. The antitrust enforcement agencies may not have sufficient expertise in network management to fully understand certain types of conduct.

And, of course, antitrust enforcement necessarily relies on a full investigation and approach that balances through the rule of reason analysis, both the harms but also the benefits of the activity and is focused primarily on economic values as opposed to non-economic values, like speech and freedom of discourse.

Finally, I think there is a real challenge associated with what remedies may be available. If you are an innovator on the edge, and you are seeking to connect to your audience, then you may have a really difficult time relying solely on antitrust laws as a remedy. If you can never afford to make all the payments that you need to make to get access to the customers in the first place, then antitrust law 5 years after that has happened is not going to be a very useful remedy for you.

Mr. CONYERS. Here is what Frank Pallone, our colleague, a Ranking Member on House's Energy and Commerce Committee said: "The FCC's current net neutrality protections provide the strongest protections for free speech and innovation online and have been upheld by the court. Keeping these rules in place is the fastest and surest way to protect consumers.

Unfortunately, the FCC is working to undo these protections at the behest of a few large corporations. I urge my colleagues to stand united in defense of these protections. That is the best option to ensure an open Internet into the future." What do you think?

Ms. MCSWEENEY. I agree.

Mr. CONYERS. Okay. What effect would rescinding the Open Internet Order have on investment and innovation in the entire Internet market?

Ms. MCSWEENEY. I think that is a really important question, one that would require probably additional investigation, except there is an extensive record that the FCC has already relied on and that has been before the courts considering the order as well that really points to this virtuous cycle, this cycle of innovation that is incredibly important. It generates demand for investment in the infrastructure. It generates demand for all of the new services on the edge. And what we risk here is undermining all of the economics of that cycle and all of the innovation that is generated by it.

Mr. CONYERS. You know, some of have suggested that broadband providers do not have economic incentive to engage in discriminatory conduct because broadband markets are competitive, and consumers can switch easily among providers. What do you say?

Ms. MCSWEENEY. Well, most U.S. broadband markets are highly concentrated. Most consumers do not have a lot of choices when it comes to what providers to use.

Mr. CONYERS. That is true.

Ms. MCSWEENEY. And finally, we do have a very serious challenge, I think, when it comes to relying on competition to solve the problems that could be generated by very large vertically integrated firms that have an incentive to interfere with their competitors.

Mr. CONYERS. Thank you, commissioner. I yield back the balance of my time.

Mr. MARINO. Thank you. The Chair now recognizes the gentleman from Texas, Congressman Farenthold.

Mr. FARENTHOLD. Thank you very much. I want to start out with the troubling case in the court right now that we may rule that AT&T is a common carrier even for their Internet service, which would take away the FCC's jurisdiction. And I wanted to ask the members of our panel do you think Congress should act to remove that exemption or create specific exceptions or wait and see? We will start with Ms. Ohlhausen.

Ms. OHLHAUSEN. The FTC on a unanimous bipartisan basis has long recommended that Congress remove common carrier exemption. So, I would continue to support the removal of that.

Mr. FARENTHOLD. And Mr. Romano.

Mr. ROMANO. Yes. I think this is one of these areas where Congress could indeed help out and provide clarity with the statute.

Mr. FARENTHOLD. Ms. McSweeney, I know you are——

Ms. MCSWEENEY. I agree.

Mr. FARENTHOLD. All right.

Mr. MCDOWELL. Without speaking directly to that case, but yes, mobile broadband, in particular the common carrier exemption, should be eliminated.

Mr. FARENTHOLD. All right. Let's talk a little bit about rural broadband for a second. Mr. Romano, correct me if I am wrong: most rural broadband is delivered by independent folks. I mean, we do not have the big boys going out into the smaller counties.

Mr. ROMANO. As I mentioned, our average employee base for our membership is about 25 employees.

Mr. FARENTHOLD. And do any of these companies generate massive content that they might want to prioritize over, you know, Netflix or Hulu?

Mr. ROMANO. Not generally speaking. No, sir.

Mr. FARENTHOLD. All right. And so, while I have you, I am going to kind of jump around here, and I apologize for that. You talked in your testimony with Mr. Goodlatte about some of the interconnect issues and call completions. Are you seeing some of the interconnect issues also in broadband, or is it just primarily in the voice service?

Mr. ROMANO. The call completion issue has been distinct to voice service, Congressman. The question that arises in our mind, though, is 10 years ago we would not have thought call completion would be an issue. We want to have somebody who can be some cop on the beat to jump in should that problem arise. We do not think, however, firm, hard, ex-ante rules are appropriate for this.

Mr. FARENTHOLD. But do not your rural broadband folks typically get their feed from fiber to go to some big pairing point somewhere? If that happens, could not they just switch to somebody else in that same pairing point and solve that?

Mr. ROMANO. In many cases, Congressman, there may be multiple routes for interconnection; however, in other cases there are not, particularly in more rural States. It can be hard to—and distant, hundreds of miles away—to get to those interconnection points.

Mr. FARENTHOLD. All right. And Ms. McSweeney, you are kind of the lone pro net neutrality person on this panel. So, I want to visit with you for a second. I am concerned that if we adopt your pre-regulatory scheme that you are talking about, we actually make it harder for those innovators to get in because if you have got a new product that the regulations do not seem to contemplate, that is potentially a bar to entry too, is not it?

Ms. MCSWEENEY. Well, I think the innovators that I am worried about are generally innovators on the edge that are trying to enter the marketplace and connect with customers and scale very quickly. And, of course, they need to be able to do that without having to pay tolls to multiple companies.

Mr. FARENTHOLD. Who is that happening to now?

Ms. MCSWEENEY. Well, we have the Open Internet Order in place now. So, we are protecting them.

Mr. FARENTHOLD. Okay. Who was it happening to a year before the Open Internet Order?

Ms. MCSWEENEY. Well, again, I think the status quo of the United States has been the open Internet, which is why having rules to continue to protect it are very, very valuable.

Mr. FARENTHOLD. Are not the Open Internet Rules then just a solution looking for a problem?

Ms. MCSWEENEY. They are an important preservation of the pipeline for innovation to customers and the Internet. So, I think that they are very critical in preserving all of the innovation that we have enjoyed from having principles that protect the open Internet.

Mr. FARENTHOLD. All right. I want to go back to moving more of this over to the FCC, because a lot of the net neutrality rules deal specifically with who delivers the Internet to your house. And we have had some big discussions on privacy there.

And if we move back to the FTC, the regulation is not just limited to say, as you will, the edge providers. You get the service providers too. I am as concerned about my ISP having my personally-identifiable private information as I am with Google and Facebook and any other place that I happen to order a pair of shorts from. So, why do we need to divvy this up between so many people? Mr. McDowell?

Mr. MCDOWELL. You raise an excellent point. Historically, the U.S. has had one expert agency to administer privacy regulation. That has been the Federal Trade Commission. It is a very complex issue. They have grappled with it beautifully. The FCC stumbled as it tried to implement that privacy order, and we need to revert jurisdiction back to the Federal Trade Commission.

Mr. FARENTHOLD. I wish I had time to give the other folks an opportunity to answer this, but I see my time is expired, Mr. Chairman.

Mr. MARINO. Thank you. The Chair recognizes the gentleman from Rhode Island, the Ranking Member of this Committee, Congressman Cicilline.

Mr. CICILLINE. Thank you, Mr. Chairman. I think at the outset, it is important to note that when the Chairman of the full Committee said, you know, "Why is not it just up to consumers?" It is important to note that 22 million people commented on net neutrality or an open Internet. And overwhelmingly, consumers said

we want an open Internet and net neutrality and support the rule. So, if we want to listen to consumers that is a good beginning point.

I would like to begin with Commissioner Ohlhausen. You said in your testimony that these noncompetitive actions of throttling and blocking, et cetera, can be cured when consumers identify it, and they can switch to a provider. So, I guess the first question I have is, is this really realistic that an individual consumer would be able to determine when a broadband provider is throttling, blocking, or prioritizing content, and then make this very frictionless transition to another provider in the absence of competition in many places in our country, and the inability for just an individual to know that?

So, does not your model or your response imagine this kind of myth that an individual consumer has the ability to detect all this stuff? Is not that why that notion of competition being the framework that will prevent this from happening just does not work?

Ms. OHLHAUSEN. So, Mr. Cicilline, the edge providers who are trying to transmit this content to consumers have an enormous interest in making sure that that content or services are delivered. So, these are not individual consumers. They are some of the most powerful, well-funded companies in the United States.

And so, often when there have been complaints that their traffic is being degraded, that certainly has gotten a lot of attention. They have a lot of incentive and ability to do that. As for switching, one of the issues that we have seen is the enormous growth in wireless broadband access. So, I think that we need to include in the market wireless providers. And so, switching has become a lot easier.

Mr. CICILLINE. But to follow up on that, should consumers be forced to incur fees, delayed access to high-speed Internet, and the trouble of finding comparable broadband service, even if it exists, to remedy the harms of discriminatory conduct of broadband providers? Does not that shift the costs of this to the consumer?

Ms. OHLHAUSEN. Well, the increased competition in the market, we have already seen that there are not fees for changing. Or if they are changing to a different provider, often that provider will pay the fees for them.

Mr. CICILLINE. Okay. Commissioner McSweeney, would you respond to that? Do you agree?

Ms. MCSWEENEY. Well, I do agree. I am very concerned that we are shifting an enormous amount of the cost of this onto consumers who are not well-positioned, as you point out, to detect most of this conduct, and very often may either have little choice or, in some cases, may be in contracts that require them to pay additional fees in order to make a change.

So, I see these markets as highly concentrated. I am very concerned about relying on just consumer demand and competition that may or may not exist in order to generate the results that we are hoping to have by having the Open Internet Order.

Mr. CICILLINE. And Commissioner McSweeney, you said in your testimony something to the effect that broadband markets are highly concentrated and that competition alone will not provide the protection that I hope we all want. I am sure you heard the testimony of Commissioner Ohlhausen. I did not completely understand

it, but the idea that we should look at competition, not just in terms of the way we look at competition normally, but some other analysis. Did that make any sense to you?

Ms. MCSWEENEY. Well, I think competition is a wonderful virtue. It is terrific in markets, but when we do not have very competitive markets, relying on an enforcement tool that is about preserving the competition or even trying to generate the competition can be a very imperfect tool. And that is why it is very well established that regulation is a complementary tool, as it is in this case, in order to ensure both the outcomes that we want, but also to make sure that consumers are protected and to make sure that non-economic values, political discourse, freedom of speech, access to content, that kind of thing, are protected as well.

Mr. CICILLINE. Thank you. My final question is for Commissioner Ohlhausen. Do you believe that paid prioritization is a form of exclusionary conduct under the antitrust law?

Ms. OHLHAUSEN. I think it can be, but it is not necessarily in every case. It depends on the market power and the ability of other competitors to get into the market. But paid prioritization is common in other markets outside of broadband, as well.

Mr. CICILLINE. And do you see any special danger of that being present in the Internet service provider sector?

Ms. OHLHAUSEN. I think we need to examine each market very carefully, and my point about market competition is that we need to understand who all the competitors are in the marketplace to be able to make an accurate analysis of what the state of competition is in that market.

Mr. CICILLINE. Thank you. I yield back, Mr. Chairman.

Mr. MARINO. Thank you. The Chair now recognizes the gentleman from Colorado, Congressman Buck.

Mr. BUCK. Thank you, Mr. Chairman. Mr. McDowell, I noticed that you twitched earlier when the Ranking Member asked Commissioner McSweeney a question, and I just want to give you the opportunity to answer that question.

Mr. MCDOWELL. So, good thing I am not a poker player because, apparently, I have a terrible tell.

Mr. BUCK. So, let me ask the question, and then you can answer it. How does that sound? The question was, "what is the effect of rescinding the Open Internet Regulations on investment and innovation of the Internet," and you seemed anxious to answer that. So, I just wanted to give you that opportunity.

Mr. MCDOWELL. Thank you. Yes. Actually, there are a number of studies out there showing an investment in broadband infrastructure has been deterred or stalled or slowed as a result of the 2015 title II Order. So, we saw robust investment and innovation throughout all corners of the Internet ecosystem before the 2015 Order. Whenever you introduce new rules in any context, investors have to first figure out what those rules are, and there is a pause at a minimum.

As we start to approach the need to invest in 5G, which will be, by the way, a substitute for fixed wireline broadband. It will be 100 times faster than 4G, and the Internet of Things, as well, investment needed there are hundreds of billions of dollars. We need to rollback ex-ante mother-may-I regulations. So actually, investors

the,—record at the FCC is replete with analyses from investors saying the best environment is the pre-2015 Order.

Mr. BUCK. Thank you. Chairman Ohlhausen, it is my understanding that a number of States have indicated that they intend to impose regulation on network ISPs if the FCC rolls back the title II provisions. What should or can Congress do in that situation? And then, I want to ask you what can the FCC do?

Ms. OHLHAUSEN. Well, Congress certainly, if it were to take this up as a legislative matter, could ensure that the Federal legislation preempted State actions in this space.

Mr. BUCK. Okay. And what about the FCC?

Ms. OHLHAUSEN. What the FCC could do? I believe the FCC has in other regulatory matters stated that it preempted State action in that space.

Mr. BUCK. Mr. Romano, I represent a rural area of Colorado. And I have visited with a number of citizens and leaders in that area, and they are very concerned about the lack of broadband in rural Colorado. One of the primary concerns is that it is very difficult to have economic development in areas that do not have broadband. What can we do? What should Congress do? What can the government do to try to encourage universal broadband?

Mr. ROMANO. Thank you for the question, Congressman. You do represent a very rural area. I think we have 15 members just in your area alone, in eastern Colorado.

Mr. BUCK. I have heard from each of them.

Mr. ROMANO. Us too. I would say three things. First of all, with respect to sort of the topic of this hearing, I think right size regulation, light-touch regulation is important. The effect on these companies, these small companies where they only have a handful of employees, of regulatory compliance costs can be significant on their operations, if not their investments. But just in managing the number of people they have to deal with and the kinds of markets they face, that is an important piece.

A second piece would be looking more towards making sure that they can stay connected to urban markets; the interconnection issue I talked about. Making sure that the fact that they are far away from urban markets, that they can still get reasonably comparable broadband. That the costs of reaching those urban markets are taken care of or accounted for somehow, and what you have to charge a rural consumer is very important.

And the third piece flows from that which is the universal service program. It is the best, most proven program ever put into place to promote rural networks which enable broadband. It is in a state of flux right now. Shoring up that program would do far more for rural broadband than any other proposal we have seen.

Mr. BUCK. And what can Congress do to shore up that program? Because the feedback that I am getting is that the reimbursement rates are decreasing, and that as a result of that, many of these rural providers are reluctant to expand the programs that they now have.

Mr. ROMANO. That is spot on, Congressman. The fact is that we are at levels of investment or recovery under the Universal Service Program that track back to 2010. We are being asked to do more and more to invest in broadband deeper and deeper into rural

areas. I think everybody wants that. It simply cannot be done for the same price we used to compensate for telephone networks ages and ages ago. We are asking these networks to do more, but yet these companies are facing right now on average a 12 percent cut to their support because of the caps in that program. And it is undermining rural broadband investment and operations.

Mr. BUCK. My time is up. I thank you very much.

Mr. MARINO. Thank you. The Chair now recognizes the gentleman from the State of Washington, Congresswoman Jayapal.

Ms. JAYAPAL. Thank you so much, Mr. Chairman. And thank you all for your testimony and for your service. The Internet should be free from discrimination against users and preserve choice and opportunity of communication for everyone. That is my basic belief. In my hometown of Seattle, believe it or not, my constituents still experience the consequences of a lack of competition among Internet providers.

Even though we have six broadband providers, their coverage areas do not overlap, and result in slower speeds and higher prices for my constituents. So, the consequences of media consolidation loom large. And increasingly with entities which create content, also distributing content, I worry that full promise of greater choices and lower cost to consumers stands to be reversed.

Can it be clearly said that companies that create and distribute content have a vested interest in ensuring that their consumers have access to their products first? We need to dig deeper into the realities of a world where as of a few years ago, just 2011, 90 percent of the American media was controlled by just half a dozen companies. Compare that to 1983, when 90 percent was owned by 50 companies. And nationwide, 62 million Americans in urban areas and 16 million in rural areas cannot access fast Internet.

And it is a serious issue, given how much the Internet is ingrained into our lives. More and more, you cannot apply for a job unless you have access to the Internet. You cannot pay bills or even check your kids' grades, as I found out when everything went online, in terms of checking what was going on with my son. So, it is clear that there is much work to be done, especially in light of ongoing efforts to undermine net neutrality.

And so, while I am pleased that we are holding a hearing on this critical issue, I am simply not convinced yet that antitrust enforcement alone is sufficient to protect consumers. And particularly on noneconomic issues like free speech, on throttling, blocking, or prioritizing content, and of questions that, Ms. McSweeney, you raised in your testimony or your answers around prevention versus remedy.

So, in the process that led up to the 2015 Internet Order and again this year, there was tremendous input from consumers to the FCC, civil rights groups, musicians, independent filmmakers, arts organizations, and many expressed concerns about free expression and viewpoint diversity. And yesterday, in The New York Times, comedian Kamau Bell wrote about the impact of net neutrality on artists. And I will just quote him.

He says, "This fair Internet, where everyone from an amateur comedian to a celebrity to a huge media company plays by the same rules, means you do not need a lot of money or the backing of

someone with power to share your content with the world.” Mr. Chairman, I ask unanimous consent to enter this op-ed into the record.

Mr. MARINO. Without objection.

This material is available at the Committee or on the Committee Repository at: <http://docs.house.gov/meetings/JU/JU05/20171101/106572/HHRG-115-JU05-20171101-SD005.pdf>.

Ms. JAYAPAL. Thank you. Ms. McSweeney, since the FTC typically views such concerns as outside of its jurisdiction, how would antitrust law have to be expanded and modified to address those concerns?

Ms. MCSWEENEY. Well, I think one of the questions that I would ask about whether we wanted to expand antitrust law to reach noneconomic concerns would be whether we really want to take a set of tools that is designed to protect competition and consumers in the marketplace and expand it outward, especially when we have an expert regulator, the Federal Communications Commission, that already has expertise and a public interest mandate on this beat.

So, I would argue that we can get the job done by using the tools the Federal Communication Commission has and by perhaps expanding and complementing the FCC’s jurisdiction with the FTC as a backup. But I do not think it is necessary for this to be an either/or premise.

So, yes, there are ways we could expand antitrust law that I think, in my view, would be very helpful in promoting competition; not just protecting net neutrality, but promoting competition generally in the marketplace and online as well. And it would be helpful maybe in protecting consumers, but we already have an expert agency with an extensive record that has proceeded in putting in place very clear rules to protect the open Internet.

Ms. JAYAPAL. And Mr. Romano, in your testimony, in your written testimony, you seem to indicate that you do believe that there is some role for both the FTC and the FCC in regulation. And, in fact, if I read this correctly, you seem to be more concerned about who is being regulated rather than the regulation itself.

So, you are asking for regulation around access of network providers. You are saying do not just put it all on the ISPs. Put it on the network providers for accessibility. But can you clarify? Do you support complete repeal of the 2015 Open Internet Order?

Mr. ROMANO. It is hard to say, with respect to a 300-page order, that there is nothing in there that we like. However, what I would say is that the rules that were adopted in 2015—and we’re companies that have operated under title II for years, perhaps the most heavily regulated is local telephone companies historically. Although today, of course, they are broadband providers, primarily.

The issue I think we have with the 2015 Order is more that it took title II, and it did not just take title II in a way that we were used to. It re-wrote some of the rules and frameworks in a way that no one was used to. So, for example, in the privacy space, the CPNI rules that were under the FCC’s section 222 mandate in the Communications Act, we were used to operating under those as telephone companies, with respect to telecommunications information. The way in which those were rewritten to gather all sorts of

information that not only telephone companies or broadband providers have, but also sweep in stuff that other people have, we just did not see that as being sort of a logical outgrowth of what title II had been.

Ms. JAYAPAL. But to be clear, repealing the order completely would potentially have tremendous disastrous consequences for rural areas, and I think the point that Ms. McSweeney was making about competition, it is difficult sometimes to get competition to operate in rural areas and places where there are not as many consumers, where there is not as much money to be made. And so, I yield back, Mr. Chairman.

But just wanted to say that I think there is a lot more nuance to this than simply repealing an order that would produce—than saying we should repeal the order, and it would produce benefits. I think there is great harm to be done. Thank you, Mr. Chairman. I yield back.

Mr. MARINO. Thank you. The Chair recognizes the gentlemen from Georgia, Congressman Collins.

Mr. COLLINS. Thank you, Mr. Chairman. I appreciate it. I think that was an interesting exchange, and I appreciate my friend from Washington in discussing that, because I think it really goes back into the role of what antitrust is and what antitrust is not. And I think Ms. McSweeney, that your answer there really sort of gave an interesting insight into why I think this Committee is so relevant, not only in this discussion, but other discussions that we can have in this because the question really becomes in a certain situation is what are we using antitrust for?

Are we trying to go out of everything that FCC already currently can do, and are we trying to expand it? Or are we simply trying to look at it from a perspective. What the big debate has become is, what is this role of antitrust? Is it to solve all of these ills of big companies and little companies, or is to make sure that there is a level playing field, that there is access to markets, there is access to it, which is traditional antitrust?

Just because someone is big does not mean that they are bad. And I think you can look at many companies coming from many different States that they are not acting in an antitrust violation. They are just large. They have made that precision. So, I think it is interesting for me this discussion, but I disagree. I am glad that it is looking to be rolled back, and I think that is a positive step in letting the trust side of it be dealt with.

And I think we can have more hearings in this regard. But Chairman, I do have a question for you, madam, is, and we have talked about this before, but under the FCC's Open Internet Order, paid prioritization is prohibited, per se, in a sense. Would you consider paid prioritization to be vertical restraint in the context of antitrust law?

Ms. OHLHAUSEN. Paid prioritization certainly is a vertical restraint, but that does not mean that it is anticompetitive or makes consumers or competition worse off.

Mr. COLLINS. Okay. And I say how well situated would be, as the FTC, with dealing with strictly antitrust here, FTC to analyze vertical restraints and their impact on this in this environment?

Ms. OHLHAUSEN. I think we are very well-positioned, and I actually want to bring the Committee's attention to recent cases that the FTC has brought against companies that have foreclosed rival content in a way that has hurt competition. So, we have the Realcomp case from 2009 and a recent case against 1-800 Contacts, which I will not say any more about, because it will be appealed to the Commission. But it is an area, foreclosing rival content in a way that is anticompetitive that we have brought action, and we certainly have the tools to continue.

Mr. COLLINS. And when I think in expanding that out for a just minute, and I think I have heard from others, and I have read your opinions, what would be the long-term effects of ex-ante or per se prohibition on this paid prioritization?

Ms. OHLHAUSEN. My concern is that the long-term effects is to stifle innovation. We do not know what new technologies might be out there, and as we move to a world of the Internet of Things with so many connected devices, the ability to transmit some of that traffic in a way that has prioritization may be enormously beneficial when you think about things like connected cars or telemedicine.

So, my concern is about freezing the Internet to the way that it looks today. And as we go back to the 2007 report, one of the biggest changes we have seen is the explosion of mobile Internet access.

Mr. COLLINS. One of the things in following up on that really where we have gotten to in the Internet today has been because there has been that freedom. There has been that, you know, to work within a current system as we go forward.

Ms. McSweeney, I just do have one question. It is my understanding that you have testified that you support the Open Internet Order as it is, correct? Including its ex-ante per se prohibition on paid prioritization, is that correct?

Ms. MCSWEENEY. Yes, that is correct. If I could just add, though, on this specialized services question, innovation around telemedicine and Internet of Things, that kind of thing, I believe—and I am not the FCC, so please ask them—but it has contemplated already in the Open Internet Order that waivers and such can be granted for that kind of innovation. So, I do not see this order as foreclosing that at all.

Mr. COLLINS. Okay. If some are starting to maybe just going off this in a different aspect of the Internet ecosystem, from your perspective, would you support, you know, it is like including edge provider support in ex-ante regulation there is, as well as relying on market forces and antitrust enforcement. Would that be something?

Ms. MCSWEENEY. You know, I think it is a really interesting question. Many are arguing that the ISPs should have the same set of rules as edge technology companies, especially the very, very large platforms that are having a huge impact on the marketplace, but also in our daily lives. And I think one of the really important questions here is what are those impacts? How much power do those companies have? And if they are very powerful, like today's ISPs in the highly-concentrated broadband markets, then we

should be having a conversation about whether our antitrust tools are sufficient.

Mr. COLLINS. Well, I think that is going to become the honest question that we are having now, and unfortunately, I have seen this before, big bad, small good. We got to get out of that and go back to what antitrust is actually supposed to look like.

But I cannot let this go, Mr. Chairman, without also saying for those of us in rural areas, northeast Georgia for mine, when you have players who are supposed to be providing broadband access, and they are not. They are using their CAT funds and other things to do other things such as they are in my area, this is just, you know, prohibiting it out. That is why we are looking at other acts of the GO Act and other things to actually provide broadband services to rural areas and get competition into the marketplace. And with that, Mr. Chairman, I yield back.

Mr. MARINO. Thank you. The Chair recognizes the gentleman from Georgia, Congressman Johnson.

Mr. JOHNSON of Georgia. Thank you, Mr. Chairman. Do any of you or do all of you support the concept of an open Internet and the principles of no blocking, no throttling, and no paid prioritization? Do you all support that concept? Ms. Ohlhausen, yes or no?

Ms. OHLHAUSEN. I support an open Internet, but I would not support a per se prohibition on paid——

Mr. JOHNSON of Georgia. Ms. McSweeney.

Ms. MCSWEENEY. I support the open Internet as contemplated in the 2015 Open Internet Order.

Mr. JOHNSON of Georgia. All right. And Mr. McDowell?

Mr. MCDOWELL. I support an open Internet, but it also depends for each of those. For instance, blocking of a child porn site. That should be allowed, right?

Mr. JOHNSON of Georgia. Well, it is already allowed under the 2015 Order. Is it not?

Mr. MCDOWELL. There are many exceptions. I just wanted to make sure that we talked about exceptions, and each of those are important.

Mr. JOHNSON of Georgia. Well, yeah, of course, subject to those exceptions. So, you support, Mr. McDowell, principles of no blocking, no throttling, no paid prioritization?

Mr. MCDOWELL. All those can have benefits. So, paid prioritization——

Mr. JOHNSON of Georgia. Yes or no?

Mr. MCDOWELL. By the way, paid prioritization in the context of title II, there is a myth out there that title II would prohibit that. Actually, title II——

Mr. JOHNSON of Georgia. It is a real simple question.

Mr. MCDOWELL [continuing]. Permits paid prioritization. Actually, it gets very complicated very quickly.

Mr. JOHNSON of Georgia. Well, I understand. Okay. You do not want to answer yes or no to the question.

Mr. MCDOWELL. Because it is complicated and nuanced.

Mr. JOHNSON of Georgia. Well, Mr. Romano and Ms. Ohlhausen were quite clear, and I was just wanting to——

Mr. McDOWELL. Well, they are looking at it through the anti-trust lens, and I am looking at it through the FCC lens.

Mr. JOHNSON of Georgia. All right. Well, let me ask this question. Do you believe, Mr. McDowell, that in order for there to be an open Internet—and I am just going to assume for purposes of this question that you do support an open Internet.

Mr. McDOWELL. Absolutely.

Mr. JOHNSON of Georgia. Do you believe that there should be rules or regulations or legislation that guarantees that concept?

Mr. McDOWELL. I would love to see Congress in this debate, this back and forth, and pass new legislation that could support an open Internet and where we would have a win-win-win situation for all the players involved. Yes, sir.

Mr. JOHNSON of Georgia. What about you, Ms. Ohlhausen?

Ms. OHLHAUSEN. Well, I really think it depends on what that legislation looks like, but I certainly would be, you know, encouraged by Congress taking this on as an issue and opening it up to further debate.

Mr. JOHNSON of Georgia. Do you think Congress would be better equipped to deal with this issue than would the FCC or the FTC?

Ms. OHLHAUSEN. I think it depends on what the legislation looked like, because I would hope it would contemplate a continuing role for the FTC going forward.

Mr. JOHNSON of Georgia. I see. Okay. Thank you. What about you Mr. Romano?

Mr. ROMANO. I think the term, Congressman, that I used in my testimony was regulatory pendulum swinging, and to the extent that Congress could help bring an end to that, I think that all involved would benefit greatly. The details of the legislation are important, but to the extent that something authoritative that assigns divisions of labor in the right way to the respective agencies based upon informed judgement of this body, I think would be welcomed.

Mr. JOHNSON of Georgia. Ms. McSweeney, what is your response?

Ms. MCSWEENEY. Well, I support the 2015 FCC Open Internet Order, so I would want to look very carefully at what was being proposed. I think there are ways to strengthen the FTC that would be helpful. But so far, the action that we have seen in this Congress has been harmful to consumers. The repeal of the Broadband Privacy Rule, in my view, was very harmful to consumers, because it eliminated the consumer choice around how their information is monetized and used. And we do not have current authority at the FTC to step in and protect consumers.

So, I would want to look very carefully at whatever was proposed, and make sure that we were appropriately protecting the open Internet and consumers and competition.

Mr. JOHNSON of Georgia. Mr. McDowell, your response to Ms. McSweeney?

Mr. McDOWELL. Thank you. So, first of all, the FCC's privacy rules never went into effect. While broadband is still classified as a telecom service, which as of this moment, it still is, section 222 of the FCC's rules apply. But the best way to get consumer privacy protection is to get the best cop on the beat on privacy, the Federal

Trade Commission, back on the beat. And that would be to return it to its information service categorization.

Mr. JOHNSON of Georgia. So, you believe the FTC is better equipped to deal with this issue of open Internet than would be the FCC?

Mr. McDOWELL. Privacy and the open Internet. These are competitive issues, inherently. These are section 5 issues, inherently.

Mr. JOHNSON of Georgia. Ms. McSweeney, do you see it that way?

Ms. MCSWEENEY. I do not because I think, as we have been discussing, there is an expert agency, the Federal Communications Commission, that is protecting both consumers and competition and the open Internet with its authorities, and it should be doing that. The FTC is a generalist antitrust and consumer protection enforcer.

And yes, we are very good at trying to bring cases to protect consumers' privacy, but we have on a bipartisan basis for years requested additional authorities to better secure consumer data. I think that is necessary, and I think there is nothing that forecloses an expert regulator like the FCC using its authorities to also protect consumers' privacy.

I do not hear Americans out there thinking they need less protection from exploitation of their information. I hear them asking for more.

Mr. JOHNSON of Georgia. Thank you, and I yield back.

Mr. MARINO. Thank you. The Chair now recognizes the gentleman from Texas, Congressman Ratcliffe.

Mr. RATCLIFFE. Thank you, Mr. Chairman. As I have listened to the testimony and the questions today, it strikes me that I think this hearing is emblematic of the larger ideological debate between those that believe in a blanket one-size-fits-all approach to regulation and commerce, versus those that believe that a free market buffeted by reasonable antitrust protections provides a better framework and better access for consumers.

I certainly fall into the free market camp, because I think even if it is well-intentioned, the overly zealous approach of regulatory overreach often just equates to a solution in search of a problem.

And so, to that point, I want to start with you, Commissioner McSweeney, because in 2007, the FTC issued a report that said and concluded that antitrust laws were sufficient to protect against anticompetitive actions on the Internet and also concluded that additional regulations would likely do more harm than good. So, my question to you is what has changed since 2007?

Ms. MCSWEENEY. Well, a lot has changed since 2007. That was a decade ago. The technology was wildly different. iPhones were relatively new. I think I got my first iPhone in 2008.

Maybe I was not an early adopter, but I think what we are talking about here 10 years later is still a highly-dynamic, very innovative ecosystem that is rapidly changing, but that has relied fundamentally on the principles that are enshrined in the FCC's order. We have been aggressively trying to protect that pipeline of innovation for more than a decade, as I am sure Mr. McDowell can talk about.

Mr. RATCLIFFE. I appreciate that. Let me reclaim my time on that. I want to give Ms. Ohlhausen a chance to respond to that line of thinking, with respect to the FCC's conclusions in 2007.

Ms. OHLHAUSEN. What I have seen change from 2007 to now is in quite a shift towards greater competition in these markets. So, wireless broadband providers now provide speeds greater than what wired broadband providers provided in 2007. We have four wireless broadband providers nationally. I mentioned improving speeds. We have seen this expansion of mobile broadband and vigorous pricing competition. So, competition has grown since that time period.

Mr. RATCLIFFE. Terrific. Thank you. Mr. McDowell, Congressman Buck had a number of questions to you about rolling back title II provisions, and I read with interest your testimony about the Internet, calling it the greatest deregulatory success story of all time. And I agree with you that a light-touch regulatory framework is the ideal approach to any dynamic industry. And I certainly see the 2015 FCC Order as rolling back that longstanding approach.

I am curious what your perspectives are. If the FCC had imposed that sweeping net neutrality order back in the 1990s, what do you think Internet access and connectivity would look like today? In other words, would it be safe to say that costs would largely be higher, and access to connectivity would largely be reduced?

Mr. MCDOWELL. So, I am sorry. Just to make sure I understand your question: you talked about net neutrality order from the 1990s. Do you mean in terms of treating broadband or Internet access back in the 1990s under the Clinton-Gore administration? Okay.

So, that was the continuation of many proceedings among both Republican and Democratic administrations to treat information services, essentially computer-to-computer communications, as something called an information service or an enhanced service back in the day. And that would not be common carriage under title II.

So, that set the stage, when the Internet was privatized in the mid-1990s—when it migrated further away from government control—that set the stage for, I think, the largest explosion of entrepreneurial brilliance in world history in all corners of the Internet ecosphere. And it was led right here in the United States of America.

This was an American phenomenon, which spread throughout the world. So, that is what we want to preserve. That is the openness and the pro-competition, the pro-investment, the pro-innovation and ultimately, the pro-consumer environment that we want to revert back to.

Mr. RATCLIFFE. Terrific. Thank you. My time is about to expire, but Mr. Romano, I did want to ask you. You know, you raised concerns about the FCC's Open Internet Order as singling out retail broadband providers with which you called ill-fitting regulations and one-sided duties. Regarding the one-sided duties that were imposed on retail Internet service providers, can you elaborate for me and for everyone how this has affected small and rural providers because as you know, that is a big part of my district?

Mr. ROMANO. Absolutely, Congressman. Thank you for the question. So, a couple of things do jump to mind. Immediately first is the privacy regulation we talked about earlier, which was poised to take effect and would have put our small companies serving very rural areas in the position of having greater protections with respect to the same data that some of the largest edge providers in the world hold. And they would have been subject to different rules and that whatever the rules are that need to be put into place to govern that data, we wanted the same rules put into place to govern everybody who holds that data.

That has an impact, obviously, on their operations in the sense that they have to take additional steps, practices, procedures to put into place to comply with the new privacy rules that were different than even the telecom privacy rules in place before it.

Mr. RATCLIFFE. Thank you. Mr. Chairman, I appreciate the indulgence. I yield back.

Mr. MARINO. Thank you. The Chair now recognizes the gentleman from California, Congressman Issa.

Mr. ISSA. Thank you, Mr. Chairman. I am sorry the gentlelady from Washington State has left, because it seemed like Seattle is a bastion of no communication choices that apparently Amazon and Microsoft are unable to generate enough bandwidth in that area to quite an underserved area. But having said that, I would like to concentrate on an assumption of monopoly for a moment. We were talking earlier, quite a while earlier, about getting rid of the common carrier exemption.

And I will start, and I will go down the road quickly, because I know this is probably an area that unites us. If we could not eliminate it completely, would it do a great service to bifurcate the exemption? In other words, as a common carrier, you are still excluded. But to the extent that you provide any products or glean any economic benefit other than as a common carrier—for example, you own part of some other content supplier and the like—that you would automatically not be covered by the exemption. Would that do most of the good you need to deal with?

Ms. OHLHAUSEN. It would take care of some of it, but not all of it. But it still leaves open the possibility that the FCC could classify wide swaths of the communications network as a common carrier service and cut the FTC out of oversight.

Mr. ISSA. Okay. So, your concern is to the extent that you would be cut out. So, legislation should be such that you not be precluded from doing in one section of the communication delivery system what you would be able to do in another?

Ms. OHLHAUSEN. That is correct, and it is particularly acute for consumer protection, because at least the Department of Justice, which also shares antitrust oversight, is not subject to the common carrier—

Mr. ISSA. And you often do a one-two with the Department of Justice?

Ms. OHLHAUSEN. That is correct.

Mr. ISSA. Is that pretty much within an answer for all that that limitation is to? Well, go ahead, Ms. McSweeney.

Ms. MCSWEENEY. I would support a clean repeal of the common carrier—

Mr. ISSA. No, I understand that you would like to have potentially a clean repeal. I am saying that it is pretty clear that when people are complaining, let's say, about Comcast, Cox, whoever it happens to be, they are always talking about not—and I am going to get to the other part in a moment—the throttling or the prioritization only, which I know you are. But they are complaining particularly about their products and services, which may be prioritized. That has been a big part of the discussion.

Certainly, I will go to Mr. McDowell. It was something that was justifying the FCC's action was the theory that it was their products and services that were being prioritized over somebody else's in an anticompetitive way. Would that be fair?

Mr. MCDOWELL. Yes. I think your question is very intriguing, all the questions embedded there, because what you are putting your finger on is convergence in the marketplace. So, we have tech companies and communications companies, wireless companies, and telecom companies, all with thousands of miles of fiber, using radio frequencies, connecting servers and routers all over the country, all over the world, that are flooded with a slurry of ones and zeros.

And I have just described a plethora of business plans here. But these old statutes, especially the Communications Act from 1934, tries to impose these silos, these regulatory silos, depending upon the flavor of the moment or who is politically favored or not. And that is why precisely, I think Congress needs to act.

Mr. ISSA. Well then, and Commissioner Ohlhausen, let me take something that is within your purview and compare it to the discussion of the day. If you are in a small town, and Safeway is the only grocery store, within Safeway, they have decided that each endcap, each row, is going to be sold to whoever will pay the most: Pepsi, Coke, whoever. That is certainly a prioritization that is paid for in a, in this case, an exclusive opportunity to buy within, let's say, 50 miles. Would you see that as something where you would come in under antitrust?

Ms. OHLHAUSEN. It really depends.

Mr. ISSA. But it happens every day in America, and you do not come in.

Ms. OHLHAUSEN. Exactly. It is very common. Paid prioritization is extremely common through all markets through the economy.

Mr. ISSA. Okay. So, the test, and you said depends, and I think this is important, and I want give Ms. McSweeney an opportunity for this sort of a discussion. Paid prioritization is an economic model that actually allows other people down the road to get a different price. The same would be true of a newspaper or magazine. They sell locations in their magazines at premium. The back cover is not randomly selected. It is paid for as a premium. And within that market, the relevant market, if you will, of a magazine, the magazine has 100 percent market share. So, every day, buyers and sellers make these decisions, and as long as you do not see an unfair monopolistic—in other words, they do not pass the other tests that exist under antitrust—we look at those and say that particular behavior is okay in this example. Correct?

Ms. OHLHAUSEN. Absolutely correct.

Mr. ISSA. So, Ms. McSweeney, you obviously have a little bit more of a command and control. You would like to cure all the evils of

society through these various regulatory processes, including that everyone should come for an exemption if they somehow have a medical device that needs a priority and hope that the government will give it to them. And I am not trying to be snide, but that is what I heard you say.

So, listening to the Chairwoman, is not it true that, in fact, we do have to recognize that the provisions of antitrust over the many decades have been the abuse of these otherwise available privileges, such as prioritization and so on of one's product, and that what you have proposed—which is that you go to government when you want to have an exception, rather than you do your business and a series of tests—will determine whether or not you have crossed the line, not just based on a behavior but based on market share and intent. Correct?

Ms. MCSWEENY. Well, here is the difference. It is very well established in antitrust law, and there is bipartisan support for this, that when we have highly concentrated industries, especially when there is vertical integration of the incumbents, that clear ex-ante rules to prohibit certain conduct is required.

So, for example, my agency just earlier this year sent a very nice comment to FRT, which looks at this in energy generation markets supporting clear ex-ante rules because simply relying on antitrust enforcement is not sufficient. So, I do not think it is a controversial concept when you are dealing with this kind of question to have an antitrust enforcement agency say, "Look, there are limitation to how we can step in here."

Mr. ISSA. Since I am last, I would like to let the Chairwoman respond because I think that although what Ms. McSweeney is saying is true, is not it true that, in fact, giving over to the FCC, as the last administration did, they actually preempted you. It was not like you were saying your regulations are complementary. What they really said was to the Federal Trade Commission and to a certain extent Department of Justice, "You sit on the sidelines. We are going to determine winners and losers, and they have to come to us for permission if they need a private network or they need prioritization for anything, including a lifesaving procedure." Is not that true?

Ms. MCSWEENY. Indeed. In fact, the Open Internet Order stated that competition in the marketplace, even if there was competition in the marketplace, that was not going to be sufficient. I also just want to mention that electricity networks are very much a unique case, right, where you have a true, natural monopoly. They are a monopoly provider. I would point the Committee's attention to the FTC's staff report from 2007 that looked at this particular market and said that competition and antitrust law and consumer protection were the appropriate tools.

Mr. ISSA. Thank you. Thank you, Mr. Chairman.

Mr. MARINO. Thank you. This concludes today's hearing. I want to thank all the witnesses for attending. And without objection, all members will have 5 legislative days to submit additional written questions for the record and submit additional materials for the record as well. Thank you very much.

[Whereupon, at 12:21 p.m., the Subcommittee adjourned.]

Subcommittee Chairman Marino
 Questions for the Record
 Subcommittee on Regulatory Reform, Commercial and Antitrust Law
 “Net Neutrality and the Role of Antitrust”
 November 1, 2017

1. **One particularly troubling aspect of the FCC's 2015 Order was its singling out of Internet service providers for particularly invasive regulation - even though other major Internet platforms pose at least as great a threat of foreclosing online competition (through blocking or various forms of harmful discrimination) as any single ISP. It seems to me that an important benefit of an FTC-based regime is that the FTC has a greater ability to prevent unfair methods of competition and unfair or deceptive acts or practices by all participants in the Internet ecosystem. Wouldn't an FTC-based regime be more effective at promoting a technology-neutral level playing field in this important area of the economy?**

I believe that the same competition and consumer protection approach should apply regardless of whether companies provide broadband services, data analytics, social media, or other so-called edge services. Indeed, having one agency with jurisdiction over these entities helps ensure consistent standards and consistent application of such standards.

As an agency with general jurisdiction across the economy, with a few notable exceptions, the FTC provides a technology-neutral approach to promoting competition and protecting consumers online. The FTC's investigations and enforcement actions in Internet-related markets have been consistent with its actions in other industries. Where harm to the competitive process outweighs the potential benefits to consumers, the FTC has initiated antitrust enforcement. Equally important, the Commission has stayed its hand when business practices are procompetitive or competitively neutral. To grow output and foster innovation across the economy, all firms must be subject to consistent antitrust enforcement—enforcement that protects consumers without placing undue restrictions on business practices that enable new technologies to flourish. The FTC's activities in Internet-related markets demonstrate its ability to protect the competitive process, promote the innovation that such competition fosters, and preserve the resulting benefits to consumers.

2. **In the waning days of the previous administration, the FCC was concerned with "zero rating," the exemption of certain online content from broadband providers' data caps. In the mobile broadband industry, zero rating spurred fierce competition, leading to lower prices and improved services for customers. How does this impact your view that antitrust is superior to *ex ante* regulation when it comes to "net neutrality"? Can you elaborate on the FTC's experience with similar vertical arrangements?**

The group of practices collectively known as “zero rating” involve contractual agreements between ISPs and content providers. So long as these firms are not directly competing with one another, such agreements are properly viewed as a type of vertical restraint.

The consensus among economists is that most vertical restraints are competitively benign and often ultimately beneficial to consumers. While it is certainly possible for vertical restraints to create competition problems that warrant government enforcement action, these situations arise relatively infrequently. Antitrust law reflects this economic consensus, generally requiring clear proof of anticompetitive harm before vertical restraints can establish a violation of law.

We note that these general principles are just as applicable to high-technology markets as they are to other parts of the economy.

Against this background, an ex post, case-by-case approach has certain key advantages over ex ante prescriptive regulation. One particular advantage is that ex post enforcement evaluates specific business practices in light of their actual market outcomes: did the practice at issue truly harm consumers or hurt the competitive process? By focusing on outcomes of specific practices, enforcers do not need to engage in the much more challenging and difficult effort of predicting the future course of economic activity.

In turn, this allows enforcers to focus their attention on clearly problematic conduct, rather than broadly squelching market developments based on hypothetical concerns that may or may not ultimately come to fruition. Where new technology is developing rapidly and it is extremely difficult to forecast future impacts, ex post enforcement is considerably less likely to falsely condemn behavior that would ultimately benefit the public.

3. If the FCC's 2015 Order is rolled back, why is it still important to repeal the FTC Act's "common carrier" exemption? How would such repeal impact the FTC's ability to regulate competition and consumer protection?

On a bipartisan basis and long before the FCC's 2015 Order, the FTC has consistently urged the repeal of the FTC Act's common carrier exemption. This carve-out is obsolete. It originated in an era when telecommunications services were provided by highly-regulated monopolies. It no longer makes sense in today's marketplace where the lines between telecommunications and other services are increasingly blurred.

As the telecommunications and Internet industries continue to converge, the common carrier exemption is likely to frustrate the FTC's ability to stop deceptive and unfair acts and practices and unfair methods of competition with respect to a wide array of business activities. The FCC's 2015 Order accelerated that effect. But even if it is reversed, the common carrier exemption will remain problematic.

This is particularly so if the Ninth Circuit panel's decision in the AT&T case stands. In that case, which arose from AT&T's pre-reclassification conduct, the FTC alleged that AT&T's "unlimited data" advertising was deceptive. AT&T moved to dismiss the FTC's complaint arguing that the common carrier exemption is activity based, not status-based. While the district court held that the exemption was status-based and allowed the FTC's suit to proceed, a three judge panel for the Ninth Circuit reversed the lower court finding the exemption to be status-based. The Ninth Circuit reheard the matter *en banc*, and we are awaiting the outcome. If the *en banc* decision is consistent with the panel decision, the common carrier exemption could disable

the FTC from enforcing Section 5 of the FTC Act not only against common carriage activities, but also against non-common-carriage activities engaged in by an entity with the “status” of a common carrier, even if that is not its principal line of business. This would put large sectors of the U.S. economy beyond the reach of the FTC, and would prevent the FTC from protecting consumers in areas that have nothing to do with provision of common carriage, such as “cramming”. In addition, the decision could have other farther-reaching effects on FTC programs including Do Not Call and enforcement of the Children’s Online Privacy Protection Act.

In addition if the *en banc* court rules that the exemption is status based, there may also be a regulatory gap because the FCC’s authority over common carriers is limited to the provision of services for or in connection with common carriage. If common carriers are providing non-common carrier products or services, it is possible that neither the FCC nor the FTC would have jurisdiction to respond to practices that harm consumers. And even in cases where the FCC can respond, it lacks the FTC’s authority to seek consumer redress.

Even if the Ninth Circuit decides in favor of the FTC, removing the common carrier exemption would still benefit the FTC’s work to protect consumers. The exemption creates an incentive for defendants to litigate over what is and isn’t a common carrier service, which inserts unnecessary cost and uncertainty into our enforcement work and the marketplace.

Removing the exemption from the FTC Act would enable the FTC to protect consumers of common carriage services (and non-common-carriage services offered by common carriers) against unfair and deceptive practices in the same way that it can protect consumers against unfair and deceptive practices by other services. For example, the FTC has a long history of privacy and data security enforcement against a wide range of technology and communications entities— companies like Microsoft, Facebook, Google, HTC, and Twitter, app providers like Snapchat, Fandango, and Credit Karma, and cases involving the Internet of Things, mobile payments, retail tracking, crowdsourcing, and lead generators. Removing the exemption will also ensure that the FTC can pursue unfair methods of competition in a uniform manner across the Internet and the rest of the economy.

In short, removing the common carrier exemption is the simplest, cleanest way to ensure consistent continued consumer protection and antitrust enforcement by the FTC.

Responses of Michael Romano
Senior Vice President – Industry Affairs & Business Development
NTCA–The Rural Broadband Association
To Questions for the Record
“Net Neutrality and the Role of Antitrust” Hearing Before the
United States House of Representatives Committee on The Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

- 1. A 2016 report from the Hudson Institute found that in 2015, rural broadband companies invested over \$24 billion and supported over 70,000 jobs in their respective states. How has Title II regulation impacted rural broadband investment and job growth?**

Response:

As explained during the hearing, NTCA–The Rural Broadband Association (“NTCA”) does not itself have any data gathered with respect to the impacts on network investment of Title II regulation as specifically adopted in the 2015 *Open Internet Order*. NTCA is aware, however, that a number of studies, such as those cited in the Statement submitted by Robert McDowell in connection with this hearing, have found that the 2015 *Open Internet* regulations deterred investment by many network operators.

To be clear, many NTCA members have operated previously under Title II regulation, and the majority continue to do so. But as I explained in my testimony, the Title II regulation to which NTCA members and other small operators like them are subject is markedly different than that imposed by the *Open Internet Order*. The Title II-based regulation that governs a part of certain NTCA members’ operations applies only to underlying network transmission services provided in connection with retail broadband, and not to retail broadband itself. Moreover, this specific version of Title II-based regulation is well-established and well-understood, as compared to the 2015 rules which substantially rewrote, reshaped, and expanded duties that otherwise had been in place for decades prior.

As described in my testimony at the hearing, despite not having access to specific data regarding investment impacts, NTCA has heard from its members that this fundamental uncertainty – the significant changes in well-understood prior Title II-based rules and the prospect of more substantial changes to come – adversely affected their operating efforts. In addition, NTCA heard from members that demands associated with education and compliance with the new, substantially expanded and changed rules (particularly those related to privacy and enhanced transparency) threatened to place burdens on their small business operations, thereby distracting from the business of building broadband networks in rural America.

2. With the 2015 Order, the FCC solely targeted broadband providers for regulation. This included large as well as small rural providers—some with a few thousand or even hundreds of customers. The FCC chose not to regulate the “edge” of the Internet. Putting aside issues of FCC jurisdiction, is this regulatory asymmetry appropriate?

Response:

NTCA expressed repeated concern dating back to 2014 with respect to the asymmetrical nature of proposed net neutrality rules, and urged the Federal Communications Commission (the “FCC”) in comments starting that year and again in 2017 to take full account of the entirety of actors in the “broadband ecosystem” in evaluating potential regulations and shaping policy. Indeed, the notion of a smaller rural provider “extracting rent” from major national edge or content providers is incredible at best, ignoring the vast bargaining power often held by the latter. As NTCA stated in a 2014 filing:

[A] singular focus on “last mile” or “retail” [Internet Service Providers] fails to recognize the breadth of the relationships that exist amongst and between: (1) those entities; (2) other entities in the Service and Network Ecosystem; and (3) consumers. Broadband Internet access service providers and Content/Edge Providers exist in a multi-sided market. . . . Moreover, other network providers exist in this Service and Network Ecosystem and are just as critical to its functioning and resultant achievement of significant public policy goals. Middle mile providers, transit providers, backbone providers, and content delivery networks (“CDNs”) all hold themselves out to retail ISPs and Content/Edge Providers alike as being capable of conveying data from one point to another for purposes of data.¹

Although the FCC alleged that retail broadband providers – including small rural providers – somehow possessed a unique ability and incentive to frustrate the goals of an “Open Internet,” NTCA pointed out that many other actors – including large content and edge providers and sizeable “middle mile” transport networks – may have just as much incentive and likely even greater ability to undermine these goals to the detriment of consumers and smaller operators.²

Beyond questions of relative bargaining power and capability of various actors to frustrate the public policy goal of ensuring consumers can access content of their choosing on a seamless and informed basis, NTCA has also highlighted that asymmetric rules can actually confuse, rather than help, the consumers they are intended to protect. As NTCA explained in opposing the FCC’s development of sector-specific privacy rules, “Most users will be unaware that regulatory oversight could depend less upon the nature of the data and more upon the holder

¹ Comments of NTCA, GN Docket No. 14-28 (filed July 28, 2014), at 3-4.

² *Id.* at 4-5.

of the data. A generally applicable standard of care derived from and beneath the jurisdiction of FTC principles that apply to all players would be a sounder approach.”³

For these reasons and others explained in the hearing testimony and prior FCC filings, NTCA has therefore consistently urged the FCC to apply any net neutrality regulations in a symmetrical manner to the extent permitted by law, and our organization also supports congressional efforts that would examine taking a similar approach in terms of the potential scope of any regulation.⁴

3. You have noted that the 2015 Order denied consumers the benefits of innovative service offerings and deterred provider creativity in responding to consumer demand. Can you elaborate more on that?

Response:

As noted in my prior response to Question for the Record #1, the Title II regulations adopted in the 2015 *Open Internet Order* were unprecedented in their application and varied greatly from any Title II-based regulation that had been adopted before. While some forms of broadband transmission had previously (or even still were) subject to Title II-based regulation, this regulation was limited and targeted at the transmission “layer” of the network, and had never applied to retail broadband Internet access service. Moreover, as described above, the changes adopted in (or in the wake of) the *Open Internet Order* were significantly different in scope and structure than Title II-based rules that preceded them; for example, the scope of the new broadband-focused privacy rules differed materially from the “CPNI” rules that had previously governed protection of telecommunications user information. Given the unprecedented extension of Title II-based regulations into the area of new services and the substantial changes in scope and structure that ensued (including queries into certain services and rating practices), NTCA believes that providers were reluctant to consider developing new means of offering services to consumers that might run afoul of the new, expansive, and potentially expanding rules.

³ Comments of NTCA, WC Docket No. 16-106 (filed May 27, 2016), at 11.

⁴ Comments of NTCA, GN Docket No. 14-28 (filed July 28, 2014), at 14-17; *see also* Comments of NTCA, GN Docket No. 17-108 (filed July 17, 2017), at 15-17.

4. Do you support a repeal of the FTC Act’s “common carrier” exemption? How would such repeal impact the FTC’s ability to regulate competition and consumer protection?

Response:

In the first instance, NTCA believes that the common carrier exemption should rightly be read as “service-specific” – meaning that the exemption only precludes Federal Trade Commission (“FTC”) oversight with respect to common carrier *services*; the exemption should not be read as “entity-specific,” which would preclude the FTC from oversight with respect to any entity that happens to be a common carrier, regardless of whether the service at issue is subject to common carrier regulation.

Nonetheless, as stated during the hearing, if the common carrier exemption were interpreted to preclude the FTC from addressing matters within its jurisdiction with respect to providers of retail broadband Internet access service, NTCA would support a repeal of that exemption. Such a measure could be designed and targeted to enable the FTC to regulate competition and consumer protection specifically with respect to retail broadband just as it would any other service offered on a mass-market basis.



Office of Commissioner
Terrell McSweeney

United States of America
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

January 2, 2018

Andrea Woodard
6240 O'Neill Federal Office Building
Washington, DC, 20024
Andrea.Lindsey@mail.house.gov

Dear Andrea,

On Wednesday, November 1, 2017, I testified at a hearing on "Net Neutrality and the Role of Antitrust" held by the House Committee on the Judiciary's Subcommittee on Regulatory Reform, Commercial and Antitrust Law. On December 6, 2017, Chairman Goodlatte relayed questions submitted for the record from Subcommittee Chairman Marino.

I have attached my written responses.

Sincerely,

A handwritten signature in black ink, appearing to read "Terrell McSweeney".

Terrell McSweeney
Commissioner, Federal Trade Commission

Enclosure

Responses to Questions Submitted for the Record from Subcommittee Chairman Marino

- 1. Critics of antitrust law, such as yourself, assert that litigation can be expensive and that a resolution can take too long relative to the dispute at issue. How would you compare that to the expense of an FCC action, or litigation under the “Open Internet” Order, and the potential time it takes for the FCC or courts to reach a resolution under the Order?**

I am a strong proponent of antitrust law. I am a realist, however, about the limitations of after-the-fact antitrust enforcement relative to prospective rules, particularly in highly concentrated markets where vertically integrated incumbents possess both the ability and incentive to discriminate against downstream rivals. In these markets, it is well established that appropriately tailored regulation may be more effective than antitrust law in deterring anticompetitive conduct.¹

Rules are generally both quicker and less costly to administer than standards. As Judge Richard Posner has explained:

There is a “distinction, fundamental in law, between a rule and a standard. A rule singles out one or a few facts and makes it or them legally determinative. A standard allows a more open-ended inquiry. Rules are generally simpler and cheaper to enforce than standards and provide clearer guidance both to the people subject to them and to the courts that administer them. But they are often either underinclusive or overinclusive, and sometimes they are both at the same time.”²

Before it was eliminated, the FCC’s Open Internet Order established clear, prospective rules. Antitrust enforcement related to data discrimination, on the other hand, would proceed under case-specific application of the rule of reason standard.

The central question in an FCC proceeding under the 2015 Open Internet Order would be whether or not an ISP engaged in data discrimination. In an FTC action under the rule of reason, the FTC would have to show not only that an ISP engaged in data discrimination, but also that the conduct was likely to harm competition. The second question – which the FTC uniquely would have to address – would entail a fact-specific inquiry into the potential for competitive harm as weighed against claimed procompetitive benefits, as well as a potential further inquiry into whether the conduct at issue was “reasonable necessary” to achieve the claimed benefits. These additional questions would occupy the vast majority of the time and expense associated with FTC investigation and litigation. Moreover, because FTC enforcement action would

¹ For example, last year FTC staff submitted a comment to the Federal Energy Regulatory Commission, voicing support for clear *ex ante* regulation to safeguard the competitiveness of power generation markets. Staff underscored the limitations of *ex post* enforcement by noting that “it could be costly, difficult, and time-consuming to detect and document” certain forms of anticompetitive discrimination by transmission system owners regarding interconnection to the electric grid. Comment of the Staff of the Federal Trade Commission, FERC Docket No. RM17-8-000, at 3-4 (Apr. 10, 2017), https://www.ftc.gov/system/files/documents/advocacy_documents/comment-staff-federal-trade-commission-federal-energy-regulatory-commission-concerning-reform/v170004_ferc_interconnection_ftc_staff_comment.pdf.

² RICHARD A. POSNER, ANTITRUST LAW 39 (2nd ed. 2001)

necessarily take place after an extensive investigation and, potentially, prolonged litigation, harm to competitors and innovators may be particularly hard to remedy under antitrust law.

2. **There are estimates that 5G deployment will drive \$500 billion of economic growth and create 3 million jobs. In a submission by Peter Rysavy, he asserts that future 5G technologies such as intelligent highways to smart-grid monitoring will depend on a flexible system that allows for certain types of prioritization. Why should the United States risk being a leader in these innovations, the jobs they will create, and the significant benefits to consumers by continuing to apply the rigid “one size fits all” regulations imposed under the 2015 Net Neutrality Order?**

The effect of Open Internet rules on innovation and infrastructure investment is an important question, and one that the FCC considered closely. I agree that the United States should not adopt policies that jeopardize its leadership in innovation at the edge or in broadband infrastructure. But the weight of the evidence says that it is the elimination of an open internet that creates that risk.

The FCC spent years studying the open internet issue. It gathered data and input from market participants, academics, and the public. Based on that record, the FCC concluded that rules were necessary to protect internet openness, which in turn promotes a “virtuous cycle,” which leads to more internet content, more innovation, better quality, and more investment in broadband infrastructure.³

The D.C. Circuit Court of Appeals upheld the FCC’s findings with respect to this virtuous cycle, noting that the Commission’s finding that internet openness drives innovation and investment in broadband infrastructure was “reasonable and grounded in substantial evidence,” and that the Commission’s reasoning “finds ample support in the economic literature on which the Commission relied.”⁴ The D.C. Circuit went so far as to observe that “[t]he Commission’s emphasis on this connection between edge-provider innovation and infrastructure development is uncontroversial.”⁵

With respect to 5G, specifically, I agree that there may be certain specialized services, such as intelligent highways and smart-grid monitoring, for which prioritization might be beneficial. The FCC’s Open Internet Order did not stand in the way of innovations related to these types of specialized services. Indeed, the FCC’s 2010 and 2015 Open Internet Orders *exempted* specialized services from the agency’s net neutrality regulations:

Non-Broadband Internet Access Service Data Services. The 2010 rules included an exception for “specialized services.” This Order likewise recognizes that some data services—like facilities-based VoIP offerings, heart monitors, or energy consumption sensors—may be offered by a broadband provider but do not

³ See FCC 2010 Open Internet Order ¶¶ 13–14 (Dec. 21, 2010), https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A1_Red.pdf.

⁴ *Verizon v. FCC*, 740 F.3d 623, 645 (D.C. Cir. 2014).

⁵ *Id.* at 644.

provide access to the Internet generally. . . . IP-services that do not travel over broadband Internet access service, like the facilities-based VoIP services used by many cable customers, are not within the scope of the open Internet rules, which protect access or use of broadband Internet access service. . . .⁶

Because specialty services would not be subject to net neutrality regulations, there is little support for concern that the FCC's 2015 Open Internet Order would threaten jobs or consumer benefits related to innovations for these types of applications.

3. If the FCC's 2015 Order is rolled back, why is it still important to repeal the FTC Act's "common carrier" exemption? How would such repeal impact the FTC's ability to regulate competition and consumer protection?

Repealing the FTC Act's "common carrier" exemption would enable the FTC to better carry out its competition and consumer protection missions regardless of the status of the FCC's 2015 Open Internet Order.

Currently, the Federal Trade Commission Act exempts common carriers. The scope of this exemption is the subject of pending litigation.⁷ Even if the FCC reclassifies ISPs as information service providers, the major providers will continue to provide common carrier services, such as voice telephone service, and will therefore remain common carriers.⁸ Unless Congress repeals the common carrier exemption in the FTC Act, the FTC could continue to face challenges to its authority over common carriers. The FCC, by reclassifying broadband internet access services, has effectively disclaimed authority to regulate crucial aspects of the delivery of broadband internet access to Americans and punted to the FTC on these issues. The FTC is unable to offer the same protections to consumers and edge providers as the FCC. But if the common carrier exemption is not repealed, there is a risk that the FTC might be unable to offer any meaningful protection or oversight whatsoever in this space.

Exemptions and carve-outs from the FTC's consumer protection authority lead to gaps in enforcement. I urge Congress to repeal the common carrier exemption. And I also urge Congress to take a close look at eliminating a number of other exemptions, such as McCarran-Ferguson, the FTC's non-profit exemption, and antitrust exemptions in the freight rail and agriculture industries. The concerns that motivated many of these exemptions are very much antiquated, and yet they present a very real barrier to our enforcement on behalf of consumers.

⁶ FCC 2015 Open Internet Order ¶ 35 (Feb. 26, 2015), https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf.

⁷ See *FTC v. AT&T Mobility, L.L.C.*, 835 F.3d 993, 2016 U.S. App. LEXIS 15913 (9th Cir. 2016), *rehearing en banc granted*, 2017 U.S. App. LEXIS 8236 (9th Cir. 2017).

⁸ Telecommunications Act of 1996 § 3.

Hearing on “Net Neutrality and the Role of Antitrust”
before the
U.S. House Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Questions for the Record
from Subcommittee Chairman Marino

1. From your viewpoint, observing the broadband industry before, during, and after your time as an FCC Commissioner; is broadband service a static utility, or instead the product of a dynamic and evolving competitive marketplace? With this in mind, how appropriate is ex ante utility-style regulation of ISPs?

Thank you, Mr. Chairman, for the opportunity to elaborate on this point. As your question suggests, the broadband ecosystem is a fiercely competitive marketplace, characterized by rapid change, falling prices, and enhanced consumer benefits. Indeed, between 2007 and March 2017, the wireless Consumer Price Index fell more than 25 percent. In the last year alone, the Consumer Price Index for wireless service fell 10 percent, underscoring the vibrancy of America’s highly competitive mobile marketplace. Companies that used to look simply like network operators now offer myriad telecommunications services as well as content, applications, and other value-added services. Firms that we used to characterize as application or content providers now have sophisticated delivery networks that provide transmission functions that look substantially similar to those offered by network operators. The only thing guaranteed as we look towards next generation networks and the deployment of 5G wireless services is even more rapid change.

Ex ante regulation is particularly ill-suited for the lightning fast pace of innovation in the Internet ecosystem. As the experiment with the original 2015 Order showed us, creating a “mother-may-I” regulatory regime resulted in real harms, as companies delayed or halted plans to roll out new services for consumers and reduced capital expenditures. The return to established antitrust and consumer protection standards, thanks to the FCC’s *Restoring Internet Freedom Order*, is a far better approach to preserving the free and open Internet we all support.

2. How has Title II regulation affected investment by broadband providers – in urban areas, as well as unserved and underserved rural areas? Has Title II regulation-as the original 2015 Order suggested-spurred a “virtuous cycle” of broadband adoption and investment?

Unfortunately, reclassification of broadband services as “telecommunications services” under Title II has had the opposite effect, slowing down the investment that is critical for bridging our nation’s digital divide. My written testimony cited numerous studies that demonstrate the amount of investment lost since November 2014, when the wireless industry first knew that reclassification under Title II was likely. Different experts have found generally that broadband investments in 2015 and 2016 dropped by billions of dollars and that mobile broadband investment declined over 17% between 2014 and

2016. This lost investment disproportionately affects poor, minority and rural Americans. Low income Americans – in urban and rural areas – face unique barriers to adoption and rely heavily on wireless service. Unserved and underserved rural areas have the most challenging economics for network deployment and are hardest hit by reductions in capital investment. The *Restoring Internet Freedom Order* promises to return the broadband economy to the successful bipartisan, light-touch regulatory scheme that enabled the United States to lead the world in 4G deployment and expanded earlier generations of wired broadband across most of the nation.

3. New technologies such as telehealth, autonomous vehicles, connected medical devices, and the Internet of Things are emerging that increasingly rely upon real-time Internet connections. Future 5G networks will rely upon “network slicing” that prioritize traffic depending upon the type of data being used. How might the current “net neutrality” rule prohibiting data prioritization affect or hinder these developments?

The advancement of the Internet of Everything and the roll out of next generation 5G networks are critical reasons that removing Title II common carrier regulation was so necessary. As you mention, 5G networks will be a great leap forward, with not only faster speeds but also lower latency that will enable incredible new applications. It is critical that carriers are able to manage their networks to accommodate the innovative services of tomorrow and experiment with new business models and services to meet the demands of their consumers.

4. In your experience as an FCC Commissioner can you describe how the FCC and FTC could potentially coordinate on addressing anticompetitive behavior?

The FCC and the FTC have a long history of successful collaboration on consumer protection, which was undercut by the 2015 Order. One of the greatest consumer benefits from the *Restoring Internet Freedom Order* is that it returns the FTC to its well-established role as cop on the consumer protection beat, able to take action against anticompetitive conduct. As FCC Commission Brendan Carr stated in his November 30, 2017 op-ed in the Washington Post, “[s]ince the FCC’s Title II decision, the FTC – which is the nation’s most experienced privacy enforcement agency – has been prohibited from taking any action regarding the privacy or data security of [Internet service providers]. Consumers will benefit greatly from a return to these protections.” Jon Leibowitz, President Obama’s first Chairman of the Federal Trade Commission, later stated in the Wall Street Journal that “consumers will remain protected and the Internet will continue to thrive” when the FCC rescinded the *Restoring Internet Freedom Order*, because the FTC can hold internet service providers’ accountable for their promises to maintain an open Internet and bring actions against corporate practices that harm consumers.

The execution on December 14, 2017 of a Memorandum of Understanding (“MOU”) between the two agencies serves to memorialize coordination with respect to online consumer protection efforts. As outlined in the MOU, the FCC will review informal complaints about the compliance of Internet Service Providers (ISPs) with the transparency rule adopted in the *Restoring Internet Freedom Order*. The FTC will

investigate and take enforcement action to the extent the accuracy of those disclosures is inadequate, as well as other deceptive or unfair acts or practices involving broadband services. This model will serve consumers and competition more effectively than the original 2015 Order.

5. If the FCC's 2015 Order is rolled back, why is it still important to repeal the FTC Act's "common carrier" exemption? How would such repeal impact the FTC's ability to regulate competition and consumer protection?

As you know, the Federal Trade Commission Act expressly prohibits the FTC from taking action against "common carriers," and the scope of that exemption has been subject to litigation and debate. The FTC has long supported a legislative change to remove the "common carrier" exemption. Congress should continue to monitor this issue and ensure a rational allocation of enforcement authority among federal agencies to ensure adequate protection of competition and consumer protection while avoiding both regulatory gaps and redundancy.