

April 15, 2015

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

The Honorable Brett Guthrie

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

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

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

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

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

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

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

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

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

The Honorable Gus Bilirakis

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

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

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

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

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

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

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

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

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

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

My best regards,



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