



**Testimony of Harold Feld
Senior Vice President, Public Knowledge**

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

**Hearing on:
A Legislative Hearing on Four Communications Bills**

**Washington, DC
Tuesday, January 12th, 2016**

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Chairman Walden, Ranking Member Eshoo, thank you for the invitation to testify before this Subcommittee with regard to: H.R. 2669, the Anti-Spoofing Act;” H.R. 1301, the “Amateur Radio Parity Act;” H.R. 2666, the “No Rate Regulation of Broadband Internet Access Act,” (“NRRBIAS” Act) and the as yet undesignated “Small Business Broadband Deployment Act” (“SBBD” Act). While Public Knowledge is pleased to reaffirm its support for the Anti-Spoofing Act, and to support the Amateur Radio Parity Act, Public Knowledge cannot support the two broadband-related bills. For reasons I shall elaborate on below, we believe that the question of what statutory limits Congress should impose on the Federal Communication Commission’s (“FCC” or “Commission”) broadband authority should be addressed in a comprehensive manner – preferably in the context of a re-write of the Communications Act as a whole.

In addition to this general objection, the proposed legislative language in H.R. 2666 raises specific concerns. While general discussion of “rate regulation” assumes traditional rate-of-return regulation as contemplated by Sections 203, 204 and 205 of the Communications Act, the broad language of H.R. 2666 would permit broadband providers to raise arguments against uncontroversial enforcement of traditional consumer

protections, such as fraudulent billing practices. Arguments over the scope of the statutory prohibition could undermine efforts to deploy rural broadband by complicating the already difficult process of updating the FCC's rules governing the Universal Service Fund.

Similarly, although the Small Business Deployment Act appears to be no more than an extension of the FCC's existing temporary suspension of the transparency rules to small broadband providers, it may have significant unintended consequences. Rural broadband subscribers and rural enterprise customers are no less in need of protection from fraud or fly-by-night providers than urban subscribers or urban enterprise customers. Customers worried that small businesses may evade accountability for fraudulent disclosure practices may flee to the arms of national providers subject to federal oversight. In rural markets, where consumers and enterprise customers frequently have no choice, they may find themselves at the mercy of local monopoly providers.

The FCC has long addressed the need to balance the limited resources of small providers against the need to protect all subscribers from fraudulent sales tactics or false billing scams. Nor does there appear to be any evidence that the FCC plans to move recklessly to impose onerous burdens on small businesses. For the time being, it appears that Congress should maintain watchful oversight rather than risk the unintended consequence of sweeping prohibitions.

I. SUPPORT FOR ANTI-SPOOFING ACT AND AMATEUR RADIO PARITY ACT.

The Anti-Spoofing Act

In July 2014, I testified on behalf of the predecessor Anti-Spoofing Act of 2014.¹ I am happy to re-iterate my support for the current anti-spoofing bill, H.R. 2669. The bill proposes common sense updates to the Anti-Spoofing Act of 2014 by including text messaging, and addresses a clear deficiency in the Act. The transition of the telephone network and the distribution of telephone numbers from traditional technologies to an all-digital platform brings enormous benefits to consumers. Unfortunately, it also provides new tools for those seeking to harass or defraud consumers. H.R. 2669 provides common sense updates to give law enforcement clear authority to address lawbreakers, while still respecting consumer privacy.

This is precisely the kind of non-controversial, bipartisan bill that should be the bread and butter of any Congress. The bill addresses a clear, demonstrated problem with carefully drafted provisions that find the often-elusive “sweet spot” between permitting innovation, avoiding undue burden on providers, respecting privacy concerns, and providing for vigorous consumer protection. Public Knowledge is pleased to endorse the H.R. 2669 and urge its swift passage.

¹ See <http://docs.house.gov/meetings/IF/IF16/20140724/102541/HHRG-113-IF16-Wstate-FeldH-20140724.pdf>

The Amateur Radio Parity Act

Similarly, H.R. 1301 appears to be an important improvement to existing FCC regulation, designed to address the demonstrated needs of the amateur radio service. For over 100 years, the amateur radio service has played an important role in stimulating interest in radio communications and technology, as well as permitting millions of amateur radio volunteers to provide needed communications in aid of public safety.

The statute clearly follows the model of the FCC's pro-competitive and pro-consumer "Over the Air Receiver Device" (OTARD) rules. It responds directly to a long-standing, demonstrated concern on which the FCC has sought Congressional guidance. The bill's language will permit state and local authorities and private landowners to protect legitimate concerns, while prohibiting unnecessary burdens on amateur broadcasters.

Public Knowledge is therefore pleased to endorse H.R. 1301, and encourage its swift passage out of Committee.

II. **OBJECTIONS TO THE NO RATE REGULATION OF BROADBAND INTERNET ACCESS ACT AND THE SMALL BUSINESS BROADBAND DEPLOYMENT ACT.**

Public Knowledge cannot support either H.R. 2666, The NRRBIAS Act, or the SBBD Act. Unlike the Anti-Spoofing Act and the Amateur Radio Act discussed above, neither NRRBIAS nor SBBD responds to a clear, demonstrated need. They are, to use a rather cliché term in the network neutrality debate, "a solution in search of a problem." Nor do

the broad preemptions in either bill appear to undertake any significant effort to safeguard against unintended consequences of their sweeping language.

General Framework of Successful Congressional Oversight: Broad Principles Or Very Targeted Relief.

As Public Knowledge President Gene Kimmelman testified before the Senate Commerce Committee last year,² Congress best succeeds when it legislates around broad principles and allows flexibility for technological change. The Communications Act of 1934 has survived so long for the same reason that legislation based on fundamental principles – such as the Federal Trade Commission Act of 1914 and the Sherman Antitrust Act of 1894 – have survived for so long. It relies on broad principles enacted by Congress and flexible administration by an expert agency capable of handling rapid technological and economic change. This focus on fundamental values such as service to all Americans and consumer protection – rather than focusing on “clarity” and “certainty” around the issues of the moment – made the United States the undisputed leader in telecommunications policy and technology. We are the nation that put a phone on every farm. We are the nation that invented the modern wireless industry. We are the nation that invented the Internet.

In all these cases, Title II played a vital part in ensuring our global leadership. The *Carterfone* proceeding and the *Computer Inquiries* of the 1970s and 1980s made the modern Internet possible. They also demonstrate the value of rulemaking flexibility. Both

² Testimony of Gene Kimmelman, President, Public Knowledge, Before the U.S. Senate Committee on Commerce, Science and Transportation, Hearing on Protecting the Internet and Consumers Through Congressional Action (January 21, 2015).

proceedings responded to changes in technology Congress could not have predicted in 1934 when it created Title II. Although *Carterfone* was initially a single adjudication, the Commission quickly found this constant case-by-case approach inherently unworkable and detrimental to the evolution of an independent customer equipment market. The Commission therefore shifted to its Title II rulemaking authority to create network attachment rules, a development widely praised as paving the way for such innovations as the answering machine (the predecessor to modern voicemail service), the fax machine, and ultimately the dial up modem – the necessary precursor to today’s Internet.³

Similarly, the FCC’s initial *Computer* proceedings that created the distinction between “enhanced services” (now “information services”) and telecommunications services took place against a background of changing technology. Again, the Commission first tried to distinguish between “enhanced services” and “telecommunications services” through adjudication⁴, and again this proved unworkable. Rather than providing the certainty necessary for businesses to innovate and technology to develop, reliance on case-by-case adjudication proved costly, time consuming, and confusing. As a consequence, the Commission adopted a set of bright line rules in its *Computer II* proceeding⁵ that allowed a wide range of services, including the dial-up Internet, to flourish. As technology and the marketplace continued to evolve rapidly, the

³ FCC Office of Plans and Policy Working Paper #31, *The FCC and the Unregulation of the Internet* (July 1999).

⁴ *Reg. and Policy Problems Presented by the Interdependence of Computer and Communications Services*, Final Decision, 28 FCC 2d 267 (1971) (Computer I).

⁵ *In the Matter of Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384 (1980) (Computer II Final Decision).

Commission responded in the *Computer III* proceeding⁶ by relaxing its rules to reflect the breakup of the Bell monopoly and their relevant changes.

When Congress has legislated to exercise appropriate oversight, it has generally recognized the need to preserve regulatory flexibility by enhancing rulemaking authority. Congress' actions in 1993,⁷ which lay the foundation for the modern wireless industry, illustrate how Congress has exercised its responsibility for oversight and used its legislative authority to direct the Commission. For more than a decade, the FCC struggled to find the appropriate regulatory framework for mobile wireless voice services. The Commission relied on case-by-case adjudication to determine which services were subject to Title II and thus eligible for interconnection rights and access to phone numbers, and which services were not Title II and therefore not eligible for interconnection. (It is important to stress that the nascent wireless industry *wanted* to be classified as a Title II service to gain the pro-competitive benefits of Title II classification.)

The 1993 Act included numerous innovations.⁸ Most importantly, Congress replaced the FCC's case-by-case adjudication with a regulatory classification for "commercial mobile radio service" (CMRS). While specifying the general principle for common definition, it explicitly required that the FCC define the statutory terms via

⁶ *In the Matter of Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Phase II Report and Order, 104 F.C.C.2d 958 (1986) (Computer III Phase II Order).

⁷ Omnibus Reconciliation Act of 1993, Pub. L. No. 103-66, enacted August 10, 1993.

⁸ For example, the 1993 Act gave the FCC the authority to conduct spectrum auctions, which it left to the FCC to define by rule subject to guidance from Congress on general principles. *See Id.* at § 309(j).

regulation. Congress also explicitly classified CMRS as Title II, but gave the FCC the flexibility to forbear from any provisions that it found unnecessary.

Finally, in 1996, Congress enacted the most sweeping reform of the Communications Act since its inception. In doing so, it benefitted tremendously from more than two decades of FCC rulemaking efforts to introduce competition into the voice and video marketplace. The 1996 Act did not abolish Title II or seek to eliminate FCC rulemaking authority. To the contrary, Congress depended on the FCC to use the combination of Title II rulemaking and forbearance both to shift the industry to a more competitive footing and to ensure that the fundamental values of consumer protection, universal service, competition, and public safety remained central to our critical communications infrastructure.

As these examples show, and as Congress has repeatedly recognized in its periodic updates of the Communications Act, rulemaking authority provides critical flexibility for the Commission to adapt existing rules to rapidly evolving technology and the ever shifting marketplace. A statute captures a single moment in time. It works best, therefore, when focused on broad and timeless principles – fundamental values such as consumer protection, competition, universal service, and public safety – rather than trying to account for every single detail.

The one exception to this pattern was when Congress passed the Cable Act of 1984.⁹ In an effort to provide “certainty” and “clarity,” Congress stripped both the FCC and local franchising authorities of the bulk of consumer protection authority. Congress instead included specific provisions to address the handful of specific issues that had

⁹ Cable Communications Policy Act of 1984, Pub. L. No. 98-549 (1984).

emerged in the 15 years the FCC had regulated cable pursuant to its ancillary authority. Congress assumed that by legislating in detail, and addressing the problems immediately before it, the 1984 Cable Act would promote both competition and innovation to the benefit of consumers.

Instead of promoting competition and innovation to the benefit of consumers, the 1984 Cable Act created a concentrated industry marked by escalating prices and poor customer service. Cable operators, free from regulatory oversight, worked quickly to crush incipient competition and leverage their control over programmers. The situation deteriorated so rapidly and thoroughly that, after only eight years, Congress enacted an almost complete and sweeping reversal of its 1984 legislation. The Cable Television Consumer Protection and Competition Act of 1992,¹⁰ unlike its 1984 predecessor, empowered the FCC to address anticompetitive practices and promote competition in broad terms.

For these reasons, Public Knowledge urges members of the Subcommittee to proceed cautiously. There is no doubt that Internet has become the central communications platform of our nation. All other communications services -- whether traditional broadcast radio and television, video services such as cable or traditional telephone voice service relying on traditional telephone numbers -- now travel over the Internet as well as over their traditional transmission media. Since the 1996 Act, the FCC has carefully managed the competing goals of ensuring a stable and reliable platform for communications and public safety, while maintaining sufficient flexibility to promote innovation and competition. Likewise, the FCC has consistently sought to balance a

¹⁰ Pub. L. No. 102-385 (1992).

“light touch” regulatory environment with providing adequate protection for consumers and stimulating the development of competing services.

As the last major overhaul of the Communications Act turns 20 years old next month, Congress has a wealth of material to develop and study. The Commission’s reclassification has not created the catastrophe that some have feared, nor has it prompted the ITU usurpation of Internet governance that others predicted. Chairman Walden, in concert with Full Committee Chairman Upton, began a long-term project in 2013 to begin the deliberative process of review for the Communications Act as a whole. Public Knowledge was an active participant in that process. It is precisely through such deliberative processes that Congress has achieved its most successful reforms of the Communications Act. Given the centrality of the Internet to all aspects of our communications infrastructure, this Committee should continue to follow the comprehensive and deliberative process initiated by Chairman Upton and Chairman Walden.

The Proposed Broadband Bills Are Not Targeted To Any Existing Danger.

Congress does not, of course, put all legislation on hold until it is ready to engage in a comprehensive review of the entire statute. Public Knowledge’s endorsement of H.R. 1301 and H.R. 2669 recognize that, when facts demonstrate a clear need, Congress should not hesitate to act. But even in these cases, the complicated and interconnected nature of telecommunications requires precision drafting, based on a clear record, so that Congress can craft targeted relief that avoids unintended consequences.

Neither the NRRBIAS Act or the SBBD Act meets these criteria. To the contrary, in both cases the bills propose premature action without careful consideration of the many possible unintended consequences. There is no evidence of any sign that the FCC intends to impose rate-of-return regulation on BIAS providers. At the same time, the broad, sweeping language these two bills employ would complicate efforts to protect consumers and small businesses from blatantly fraudulent and anticompetitive practices.

Concerns With NRRBIAS Act

H.R. 2666 states:

Notwithstanding any other provision of law, the Federal Communications Commission may not regulate the rates charged for broadband Internet access service.

This language gives no limit to what is meant by “regulate the rates.” The use of the even broader language “notwithstanding any other provision of law” lends itself to an interpretation that would include enforcement of the rules supposedly left untouched as indirectly “regulating” rates.

For example, thousands of consumers have complained that Comcast has consistently provided them with inaccurate information about their data consumption, billing them for broadband data they did not use.¹¹ Would FCC investigation into these complaints count as “rate regulation” prohibited by the statute? While no one has suggested any intent by Congress to leave consumers vulnerable to blatant billing

¹¹ Daniel B. Kline, “Why Does Comcast Have More FCC Complaints Than AT&T, Verizon and TWC Put Together,” The Motley Fool (January 2, 2016). <http://www.fool.com/investing/general/2016/01/02/why-does-comcast-have-more-fcc-complaints-than-att.aspx>

misconduct, the broad language here could be interpreted as preventing the FCC from investigating any such complaints, or from ordering ISPs overcharging subscribers to cease such practices. Similarly, although the language limits itself to regulating “rates charged for broadband Internet access service,” would the language prohibit the FCC from taking complaints with regard to interconnection for broadband services, or prohibit special access reform? While these do not *directly* regulate the rates for broadband access service, opponents can argue that action would *indirectly* “regulate rates.”

Such sweeping language may interfere with the FCC’s efforts to reform the Universal Service Fund to bring broadband to rural America and to those who cannot afford broadband. The proposed NRRBIAS Act prohibits any form of rate regulation, “***notwithstanding any other provision of law.***” This broad language certainly includes the statutes governing the High Cost and Lifeline funds established under Section 254. Opponents of these reforms have already objected that the FCC’s reforms constitute rate regulation. Although the 10th Circuit Affirmed the FCC’s reforms on the High Cost fund in 2014, passage of NRRBIAS would allow those who lost a “second bite at the apple,” further delaying efforts to deploy broadband to rural America.

It is important to stress that none of these interpretations need to succeed in court to have a chilling effect of consumer protection or USF reform. But the broad and sweeping language used by H.R. 2666 invites all manner of objections to any efforts to protect consumers, reform special access, or even to reform USF to make rural broadband more available and affordable. After all, making something “more affordable” through government subsidy is arguably as much an effort to “regulate the rate” of broadband access service as a rate cap.

Given that both Republicans and Democrats have stressed the need for certainty, this Subcommittee should be wary of introducing such dramatic uncertainty by passing such a broadly worded bill.

Concerns With The SBBD Act.

The Small Business Broadband Deployment Act likewise imposes a fairly substantial change in the law without much evidentiary need for such action. No one has submitted information on whether the existing transparency regulations impose significant costs, in what way they might impose significant costs, and would could be done to mitigate these costs while still providing adequate protection for consumers. While it is certainly the case that administrative burdens larger providers find trivial can impose significant burdens on small providers, no one has provided any credible evidence that the FCC is prepared to act with indifference to these concerns.

To the contrary, the FCC has acted with sensitivity to the concerns of small providers about potential regulatory burdens. Rather than impose the enhanced transparency and reporting requirements, the FCC has waited to see whether it needs to act.

If future events show that additional enhanced transparency requirements are needed to protect consumers and enterprise subscribers – particularly in rural areas where small providers are often the most affordable option – the FCC should have authority to tailor the necessary transparency protections to the situation. While there is no doubt that the vast majority of small broadband providers are local businesses interested in

providing much needed services to their communities at fair prices, every business has its share of fly-by-night operators and scammers. If Congress creates a safe harbor from transparency obligations, it will encourage entry by those intent on defrauding subscribers or enterprise customers posing as legitimate small broadband providers.

Additional safeguards already exist to prevent the FCC from accidentally overburdening small businesses. FCC action is subject to review by OMB under the Paperwork Reduction Act and similar statutes. In the absence of any immediate evidence that the FCC is preparing to impose new transparency regulations, the pro-consumer and pro-competitive value of transparency regulations, and the additional safeguards provided by the Paperwork Reduction Act and other general provisions of law, Congress should maintain a “wait and see” approach while the agency continues to do its job and build the necessary record.

Finally, Public Knowledge notes that the proposed bill would dramatically expand the number of subscribers of a “small” provider from 100,000 to 500,000. Nowhere has there been any claim that providers with 500,000 subscribers face the same constraints as those currently covered by the FCC’s existing exemption. By expanding the number of customers a small provider may have by five-fold, without any explanation or evidentiary record for the increase, the proposed statute would depriving as many as 13 million Americans of the benefits of enhanced transparency with no proof of any offsetting gain.

Indeed, the statute may create a perverse incentive for enterprise customers and sophisticated subscribers to select large businesses over smaller, local businesses. These customers have a greater need for transparency and full disclosure, and are therefore more likely to select larger providers subject to FCC accountable for enhanced

transparency. It would be an unfortunate irony if, in the haste to protect small providers from imaginary burdens, Congress created a real incentive for the most valuable customers to avoid small providers in favor of larger ones because of the increased level of consumer protection.

In the event real problems do begin to emerge, Congress can act swiftly to address them with targeted relief that strikes a proper balance between competing concerns. That is what Congress has done with both the Anti-Spoofing Act and the Amateur Radio Act. Congress should follow this same approach here.

Conclusion

In exercising its proper oversight role of the Federal Communications Commission, Congress has achieved the greatest success when legislating in broad principles while allowing the Commission to develop rules tailored to the complicated and dynamic communications marketplace. Additionally, when experience shows the need to provide a statutory correction, it has benefited from development of the record by the FCC before acting. This has allowed Congress to act with precision, avoiding unintended consequences.

Both the Anti-Spoofing Act and the Amateur Radio Act are examples of this successful, deliberative approach. By contrast, the proposed NRRBIAS Act and the proposed SBBD Act are both premature and sweeping in scope, a combination that maximizes the likelihood of unintended consequences that would harm consumers, damage competition, and delay efforts to facilitate rural broadband deployment.

Thank you for inviting me to testify. I look forward to answering your questions.