February 7, 2019

Congressman Michael Doyle
Chairman, Communications & Technology Subcommittee
House Energy & Commerce Committee
2125 Rayburn House Office Building
Washington, DC 20515

Congressman Robert E. Latta
Ranking Member, Communications & Technology Subcommittee
House Energy & Commerce Committee
2125 Rayburn House Office Building
Washington, DC 20515

RE: "Preserving an Open Internet for Consumers, Small Businesses, and Free Speech"

Dear Chairman Doyle and Ranking Member Latta:

It is time to end the lengthy, distracting, and toxic fight over net neutrality. Only legislation can do that. Unless Congress and the President act, jurisdiction over this issue will continue to swing between the Federal Communications Commission (FCC) under Democratic administrations and the Federal Trade Commission (FTC) under Republican administrations. Neither side will be satisfied: Some will argue that the FTC cannot adequately protect consumers. Others will worry that the FCC's claims of vast authority to regulate broadband will necessarily discourage investment — not just in broadband but also other services as well. This looming possibility remains despite the FCC's 2017 Restoring Internet Freedom Order, because companies making long-term decisions must assume the next Democratic FCC will re-assert these broader claims of statutory authority.

There has long been bipartisan consensus on the core of net neutrality. Simply put, consumers should be able to access lawful content and services of their choosing. It was, after all, two Republican FCC Chairmen who first articulated these principles as statements of policy (even if Michael Powell's 2004 "Four Freedoms" speech and Kevin Martin's 2005 Open Internet Policy Statement were not legally binding). Even broadband providers themselves have not contested the so-called "bright-line rules" in the 2015 Order against blocking and throttling (subject to exceptions for reasonable network management), and requiring transparency. Furthermore, the FCC's rules never applied to the niche of broadband providers that clearly hold themselves out as providing a curated experience of the Internet — say, for child protection or religious reasons.

While there remain some important and legitimate disagreements over how to implement net neutrality principles, the debate that has consumed so much of the limited attention of

the FCC and this committee over the last eleven years has principally been about the authority claimed by the FCC to regulate Internet services under two statutory provisions:

- **Title II** of the 1934 Communications Act is, at its core, a system of price controls. Despite the FCC's insistence that it had "forborne" from the most burdensome aspects of Title II in the 2015 Order, the agency did *not* forbear from the core provisions of the 1934 Communications Act: Sections 201(b) (just and reasonable practices) and 202(a) (no unreasonable discrimination).[1] These provisions are the heart of common carriage regulation, and were taken directly from the Interstate Commerce Act of 1887. Just as the comparable provisions of that act provided a sufficient basis for imposing price controls on railroads, so too would these provisions of the Communications Act provide ample basis for the FCC to regulate broadband however it saw fit. Indeed, we believe the 2015 Order implicitly reclassified not only broadband but *any* service that uses IP addresses as Title II services — most obviously, including Internet telephony.[2]
- **Section 706** of the 1996 Telecommunications Act[3] was, until 2010, understood by the FCC as a commandment to use powers elsewhere granted to it for the purpose of promoting broadband. The 2010 Open Internet Order reinterpreted Section 706 as a free-standing grant of authority to regulate any service within its jurisdiction in ways that would somehow promote broadband deployment. The D.C. Circuit clarified in its 2010 *Verizon* decision that this would not allow the FCC to do anything that would violate the Constitution or the Communications Act, such as imposing common carriage requirements on non-common carriers. Even this "limit" would still leave the FCC with staggering discretion that Congress could not have intended — not only over broadband but *any* form of communications.

If Congress provides clear statutory authority for the enforcement of net neutrality principles, there will be no need for the FCC to reassert authority under either Title II or Section 706. In exchange for such authority, Congress should clarify that (i) Title II does not apply to Internet-based services other than "interconnected VoIP" (which replicates the ability of traditional telephony to call NANP phone numbers) and (ii) Section 706 confers no independent authority.

In closing these doors on the FCC's unbounded discretion to regulate Internet services, Congress must not open another. Specifically, while there is broad support for codifying the

---

[1] 47 U.S.C. §§ 201(b) & 202(a).

[2] *See generally* Petition for Writ of Certiorari, *TechFreedom v. FCC*, 825 F.3d 674 (No. 17-503) at 24 [hereinafter *TechFreedom Cert Petition*], http://docs.techfreedom.org/TF-OIO-Cert-Petition.pdf.

[3] 47 U.S.C. § 1302.

2015 Order's rules, that Order's so-called "general conduct" standard was so hopelessly vague that even FCC Chairman Tom Wheeler, when asked what it meant, conceded that "we don't really know" and "we don't know where things go next." In effect, this standard simply embodied the vagueness of Sections 201(b) and 202(a). Recreating this non-standard standard would effectively codify Title II.

Yet we also understand the need for some catch-all standard to govern net neutrality cases that cannot be anticipated by bright-line rules. In fact, a "general conduct" standard already exists: it is Section 5 of the FTC Act, which gives the FTC broad discretion to punish practices that are anti-competitive, unfair or deceptive. Unlike Title II, this is a meaningful standard because it requires the FTC to justify its actions — either by showing (i) harm to the competitive process, (ii) tangible harm to consumers in ways they could not reasonably avoid without countervailing benefit to them or to the competitive process, or (iii) that consumers were denied the benefit of something they were explicitly or implicitly promised (even without proof of harm). A large body of case law would guide the application of this standard in ways that would be competitively neutral as between ISPs and other players in the Internet ecosystem. In short, Section 5 is the right standard by which to police net neutrality cases, broadband more generally, and indeed, the entire Internet ecosystem.

Assigning the enforcement of bright-line net neutrality rules to the Federal Trade Commission would ensure that a unified, consistent approach. Just as with children's privacy and credit reporting, the FTC could bring complaints under both these rules and its broader Section 5 "general conduct" standard. If, instead, Congress assigns responsibility for these rules to the Federal Communications Commission, the FCC should be required to follow Section 5 principles as its "general conduct standard."

In closing, we must clarify several critical misunderstandings that have frustrated rational discussion of this issue:

- **The courts have never "blessed" the FCC's 2015 rules or authority**. As the D.C. Circuit said in 2017, "Our task is not to assess the advisability of the rule as a matter of policy."[4] Even on the narrower question of statutory interpretation, the D.C. Circuit did not say the FCC's interpretation of Title II and Section 706 were actually what Congress intended — merely that they were reasonable under the highly deferential standard of review under *Chevron*. Under the same standard, the courts will almost certainly defer to the opposite interpretations as well.
- **The courts may yet block the FCC from claiming Title II and Section 706 powers.** Even if the D.C. Circuit should decline to uphold the FCC's 2017 Restoring Internet

[4] *United States Telecom Ass'n v. FCC*, 855 F.3d 381, 383 (D.C. Cir. 2017).

Freedom Order under *Chevron*, or find some procedural flaw in the issuance of that Order, the courts would still have to confront the constitutional permissibility of the FCC's interpretations of Title II and Section 706. Then-Judges Kavanaugh and Brown, in their dissents from the D.C. Circuit's decision not to rehear *en banc* the panel decision upholding the 2015 Order, made powerful arguments that the FCC's claims to authority violated the Constitution's separation of powers, and were therefore unconstitutional.[5] The Supreme Court has clearly grown more skeptical of *Chevron*, even before the appointment of Justice Kavanaugh. As such, Congressional Democrats cannot assume that the Court will uphold the FCC's authority over broadband when reclaimed by a Democratic Commission.

- **The FCC's rules were essentially optional**. In explaining their vote not to re-hear the panel decision, two judges on the D.C. Circuit dismissed the First Amendment arguments raised by Judges Kavanaugh and Brown in their dissents — because broadband providers could simply opt-out of the rules. They explained that "[t]he rule does not apply to an ISP holding itself out as providing something other than a neutral, indiscriminate pathway—*i.e.*, an ISP making sufficiently clear to potential customers that it provides a filtered service involving the ISP's exercise of 'editorial intervention.'"[6] Thus, the FCC's rule served to "fulfill the reasonable expectations of a customer who signs up for a broadband service that promises access to all of the lawful Internet without editorial intervention"[7] — essentially akin to the FTC's deception power. As such, the FCC's jurisdiction under the 2015 Order was arguably more limited than the FTC's jurisdiction would be.

* * *

We stand ready to assist the Committee in forging a bipartisan compromise to resolve this issue once and for all; provide certainty to Internet investors, entrepreneurs and users; and finally allow the Congress to move on to other pressing Internet-related policy issues that have suffered because of the paralysis caused by this fight. The sooner Congress resolves this issue, the sooner it can move on to promoting the deployment of broadband to all Americans.

Sincerely,

TechFreedom
Americans for Prosperity
Lincoln Network

Tom Schatz, Citizens Against Government Waste
Roslyn Layton, Visiting Scholar, American Enterprise Institute

[5] *Id*. at 418-26 (Kavanaugh dissenting) and 408-17 (Brown dissenting); *see generally TechFreedom Cert Petition*.
[6] 855 F.3d at 389.
[7] *Id.*