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ON

PRESERVING AN OPEN INTERNET FOR CONSUMERS, SMALL BUSINESS, AND FREE SPEECH

Before the

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Good Morning, Mr. Chairman and Members of the Committee. My name is Michael Powell and I am the President and CEO of NCTA – The Internet & Television Association. It is a privilege to appear before you today to discuss this important topic.

In software programming, an infinite loop is defined as *“a piece of coding that lacks a functional exit so that it repeats indefinitely.”* Similarly, the net neutrality issue is caught in an infinite loop. It is high time to debug this debate—avoiding approaches that will only perpetuate it—and reach a bipartisan resolution that puts in place a sound and enforceable set of rules.

For 15 years, we have swirled endlessly without a stable conclusion to net neutrality. No fewer than six different FCC Chairmen of both political parties have wrestled with the issue. Net neutrality rules have moved into the courts now four different times, each taking years of exhausting and expensive litigation to complete. The country sorely needs Congress to break this interminable circularity. That is why we support bipartisan legislation to enshrine core net neutrality safeguards without sacrificing the flexibility needed for all market participants to retain incentives to invest, innovate, and prosper.

Critically, this infinite loop does not stem from a lack of agreement over the need for basic rules that would protect the open internet. All major stakeholders support the establishment of binding rules, which is why the broadband industry has consistently engaged with Congress and other policymakers on establishing durable and enforceable requirements. Moreover, there is a fairly consistent consensus about what the rules should be. Since 2004, when I outlined the four internet freedoms while serving as the FCC Chairman, we have found common ground around the basic tenets of net neutrality rules: There should be no blocking or

throttling of lawful content. There should be no paid prioritization that creates fast lanes and slow lanes, absent public benefit. And, there should be transparency to consumers over network practices. Working in good faith, we could easily write effective code to protect an open internet. So, what is the problem?

A software infinite loop is caused by a programming error where the conditions of exit are written incorrectly. The bug that is responsible for the net neutrality endless loop is ambiguous legal authority. The FCC has struggled to adopt sustainable rules because it lacks a clear basis of jurisdiction on which to moor net neutrality rules that would apply to internet service providers. Figuring out what the rules should be has not been the problem. Rather, the problem for the Agency has been how to adopt appropriately targeted rules in the absence of clear congressional direction. If authority is the problem, congressional action is the answer.

The FCC has spent years trying to shoehorn net neutrality's square peg into the Communications Act's round hole. The difficulties it has faced in doing so are not surprising. The FCC's statutory authority was drafted in an era that predates the rise of the internet. Congress has not comprehensively addressed communications policy since 1996, eons ago in internet time. Trying to address a contemporary question using antiquated tools requires the Commission to engage in contorted legal gymnastics.

Four years ago, then-Chairman Tom Wheeler in his effort to find a sustainable legal basis for net neutrality rules, took a radical step. He shifted from long-standing policy, and subjected internet service providers to a 1930s model of common carrier regulation, known as Title II. Since the birth of the internet, broadband service had been classified as an "information service" under Title I of the Communications Act—a classification that was

affirmed by the Supreme Court, repeatedly reaffirmed on a bipartisan basis and facilitated the rapid growth of the internet ecosystem.

To effectuate this change, the FCC Majority engaged in a bit of regulatory alchemy. They waived their regulatory wand and transformed internet access companies into telephone companies, simply by changing their legal classification. It is something akin to a Fruit Regulatory Commission that cannot find a way to regulate blueberries, so it dyes them red and calls them raspberries. But the consequence of that sleight of hand was far greater than a change in color. It had the collateral, and some might say primary, effect of suddenly expanding governmental power over the internet by plopping companies into a category over which the FCC had enormous pre-existing power. Once ISPs were treated as telephone companies, the FCC could regulate them under Title II's massive body of telephone law.

This action was widely known as the "nuclear option" for good reason. Anyone who has a full understanding of Title II law would agree this was an explosive and destabilizing action. ISPs had built their businesses for decades, investing billions of dollars, on the promise that they were not under the heavy yoke of Title II. Title II consists of thousands and thousands of regulations, as well as common law, developed since the 1930s to regulate the landline telephone system. A telecommunications lawyer spends her entire career gaining a working understanding of these laws and the countless court cases and agency rulings interpreting them. By trying to fix the jurisdiction bug, the FCC ended up introducing a new more damaging one that is fraught with unintended and unexplored consequences that could severely harm the internet ecosystem. Moreover, Title II shattered the strong bipartisan consensus and politicized the issue, guaranteeing that the rules would swing wildly with every election.

As Congress once again takes up this issue, it is important to recognize that Title II is not a synonym for “strong net neutrality” as some advocates breezily maintain. In fact, Title II is entirely distinct from net neutrality and is an unnecessary precondition for Congress to establish strong net neutrality requirements coupled with strong enforcement. The legislature does not have to resort to an antiquated and ill-fitting regulatory framework to achieve its objectives. While the FCC may be handicapped by the limited authority Congress grants it, the Congress is limited only by the Constitution.

Nor is Title II merely a legalistic distinction with no real consequence. Title II is a giant body of law that was crafted more than 60 years before the invention of the internet. Like all regulation, Title II is built on a set of critical predicates about technology, market structures, investment incentives, and consumer protections that existed at the time. The phone technology of that era was analog, twisted-copper wire and wireless technology was pure science fiction. The sole application for decades was a voice call, and the market long consisted of a single telephone company whose monopoly the government supported and preferred over competition.

None of the cornerstones underpinning Title II are valid or logical when applied to the modern internet. Internet digital technology is radically different from the switched phone services of yesteryear. Rather than a single application on the network, there are now literally billions of varied types of applications. The market is dramatically more dynamic and warrants a suitably flexible regulatory framework. Moreover, the internet, in contrast to the phone network, is almost exclusively funded by private capital, freeing scarce public resources for other pressing societal concerns. And, perhaps most critically, the internet network evolves

and innovates at a dramatically faster pace than the telephone network. In this environment, the core provisions of Title II—providing for expansive rate regulation and allowing regulatory second-guessing of virtually every business decision an ISP can make—are a complete mismatch in the internet marketplace.

Title II is so incongruous with the dynamics of the internet today, one should be profoundly reluctant to slap it in place—most certainly without a rigorous, careful and thorough examination of how it will apply and impact the vibrancy of today’s internet. The risk of serious unintended consequences is substantial; to name just a few examples: impeding the pace of innovation, undermining investment incentives to deploy broadband to more areas, and raising costs and consumer prices. This is not hyperbole, in the short two years in which Title II was in place, we saw the depressing effects on the market of such a distorted regulatory overhang—innovation slowed as ISPs and edge providers delayed or abandoned new service offerings, and the pace of investment in broadband networks demonstrably slipped. This is precisely what the literature would predict, given the extensive historical evidence of the harms resulting from efforts to impose public-utility-style regulation on dynamic industries.

As Congress diagnoses net neutrality and considers a remedy, it should be guided by Greek physician Hippocrates who famously counseled, “first, do no harm.” Even a cursory examination of the internet marketplace raises serious doubts about the wisdom of prescribing a high dose of pain medication to a relatively healthy patient. The internet is the fastest deploying technology in the history of the world. The industry that built it has invested over \$1.6 trillion dollars to bring internet services to 94 percent of American households. The U.S. broadband platform has been the foundation on which the world’s most innovative web

companies have launched and thrived—all on our shores. Compare the health and vibrancy of our internet infrastructure, which for most of its existence has not been subject to public utility regulation, to the crumbling infrastructures of those industries that are so regulated. The American Society of Civil Engineers gives America's electric grid, our roads, our airports and our drinking water systems a near failing grade. Are these the models we want to emulate for the internet?

By contrast, in the wake of removing Title II, we have seen a burst of energy flowing into network innovation and investment. America's wireless broadband companies are investing heavily to bring 5G services to our citizens. Equally as impressive, the cable industry has just deployed 1Gbps (Gigabits per second) speeds to 80 percent of American homes, up from just 4 percent two years ago. And, we recently announced our 10G initiative, a dramatic leap in broadband that will bring 10Gbps speeds to American homes—10 times what is available today. These bold initiatives are certainly not going to be advanced by new Title II regulation, and the risk that they will be impeded is significant. The effect will be to undermine American global technology leadership.

The idea of travelling back in time and invoking Title II raises countless questions. Will regulating the internet business under the heavy authority of Title II actually improve upon the results we have seen so far? Will Title II get more broadband to more people in rural and underserved communities? Will Title II increase the pace of innovation? Will it increase the flow of investment capital? Will Title II facilitate more competition? Will FCC regulators do a more efficient job setting prices and terms of service than market forces? Do we want

government attorneys substituting their judgments for those of network engineers on managing this complex infrastructure? I believe the answer to all these questions is no.

Given the great dangers and slim benefits of Title II, and the unquestionable fact that Congress can adequately protect net neutrality without it, Congress has the opportunity and the tools to rewrite the script and end the infinite loop. Unlike the regulators, this institution has the constitutional power to create new legal authority. It has no need for legal alchemy or contorted legal theories to write strong, enforceable net neutrality code. Stated plainly, Congress does not need Title II to achieve its professed objectives.

If, however, Congress looks backwards and tries to force Title II's mold onto today's internet, it will be doing something entirely distinct from protecting the open internet. It will be making an ill-considered decision to regulate the internet in a heavy-handed, aggressive manner that departs radically from the consensus of lighter regulation that has prevailed for decades and has produced admirable and exceptional results. Worse yet, it would take a path with no realistic prospect of attracting sufficient bipartisan support. Such a quixotic exercise would only ensure that we remain trapped in our perpetual loop. And, yet again, uncertainty will reign over clarity, and start-ups and consumers will continue waiting for the essential protections they deserve. The only net neutrality rules with teeth are those that actually become law.

If we can put down the Damocles sword of Title II and work in a constructive bipartisan manner, I pledge that our industry will enthusiastically support legislation and work tirelessly to help finally put in place a set of stable and enforceable net neutrality rules.

Thank you for the opportunity to appear here today.