March 12, 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: Legislating to Safeguard the Free and Open Internet

Dear Chairman Doyle and Ranking Member Latta:

The "Save the Internet Act of 2019" (H.R. 1644) purports to accomplish three things:

1. "Repeal" the FCC's 2017 Restoring Internet Freedom Order (RIFO)[1] (which reversed the 2015 Open Internet Order);[2]
2. "Prohibit" the FCC from reissuing the RIFO or anything like it; and
3. "Restore" the 2015 Order and the Open Internet regulations issued thereunder in the Code of Federal Regulations (Part 8, Title 47).

At the press conference launching H.R. 1644, sponsors of the bill had diametrically opposed views of whether the bill would forbid or mandate regulation of broadband prices — something that Title II allows, but which has nothing to do with net neutrality. The fact that they could disagree on something so fundamental illustrates a more fundamental problem with H.R. 1644: its sponsors claim they are merely reviving the 2015 Order, but that just can't be done with a one-page bill. Instead, more detailed legislation would need to be enacted.

[1] *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report, and Order, FCC 17-166 (Jan. 4, 2018) [hereinafter *RIFO*], https://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0104/FCC-17-166A1.pdf.

[2] *See Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5803 ¶ 431 (2015) [hereinafter Open Internet Order], https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf.

Specifically, to do what the bill's sponsors want, legislation would have to:

1. Do one of two things:
    a. Codify Broadband as a Title II service — instead of merely declaring the 2015 Open Internet Order "restored" and explicitly decide which Title II powers Congress was denying to the FCC, rather than just assuming the 2015 Order's forbearance decisions would be granted,
    b. OR write a new Title of the Communications Act, an idea Sen. Bill Nelson dubbed "Title X," that included only the concepts of Title II that the FCC is supposed to be left with
2. Codify net neutrality rules directly into legislation — instead of merely declaring a section of the Code of Federal Regulations to be revived, which doesn't actually put them into the U.S. Code or give them the weight that statutes get.

To do what Democrats *think* they're doing, a third thing would be required: the FCC would also have to clearly supersede the 2017 resolution of disapproval enacted under the Congressional Review Act (CRA) by Congressional Republicans,[3] which barred the FCC from issuing any new rule that is substantially similar to the Broadband Privacy Order issued by the FCC at the very end of the Obama Administration.[4] Otherwise, even if broadband were clearly declared to be a Title II service, the FCC would be unable to issue broadband privacy rules, and the Federal Trade Commission would again lose jurisdiction over broadband.

We explain each of these problems in turn below. While the third problem could probably be fixed easily, we suspect that doing so would defeat the real purpose of this bill: to allow Congressional Democrats to present a bill that at least seems to resemble the CRA resolution of disapproval concerning the 2017 RIFO, for which three Republican Senators voted. Complicating H.R. 1644, even slightly, would defeat what seems to be the bill's primary purpose: not to resolve the issue of net neutrality, but to allow Congressional Democrats to put Congressional Republicans in a political bind.

However, the first two problems cannot be fixed. For this reason, if H.R. 1644's sponsors are serious about "protecting net neutrality," they will need to start over with an entirely new bill — something TechFreedom has called for since 2014.

[3] *See* S.J.Res 34, 115th Cong. (2017).

[4] Report and Order, *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106 (Nov. 2, 2016), available at https://goo.gl/iAwro0.

I. Why the CRA Couldn't Restore Title II and H.R. 1644 Can't Either

H.R. 1644 is crafted to mirror the previous House Congressional Review Act (CRA) Resolution,[5] which never came to a vote in the House, and by statute, died with the end of the last Congress. By the clear terms of the CRA statute, a CRA can only be exercised in the same Congress as when the rules are first presented to Congress. Thus, this bill cannot be moved through the legislative process using the expedited procedures of the CRA, such as the use of a discharge petition to force a vote in the Senate with a bare majority of Senators.

A. How the CRA Works Generally

Last year, TechFreedom explained at length why the CRA resolution wouldn't have done what Democrats claimed in a letter to Congressional leadership, which we attach hereto as **Appendix A**.[6] Also attached, as **Appendix B**, is our analysis of Harold Feld's response to our letter.[7] In summary, the CRA can only block "*rules*," which regulatory agencies issue as delegations of the *legislative* function delegated by Congress. It cannot be used to reverse adjudicatory orders, which are quasi-*judicial* in nature. This is not merely a limitation upon the CRA that could be bypassed in legislation taken outside the scope of the CRA: it is a reflection of the separation of legislative and judicial powers, a constitutional limitation that applies to this legislation just as it does to the CRA.

There is a staggering irony lurking behind Democrats' confusion over what is and isn't subject to the CRA. If H.R. 1644 could, simply by saying so, reverse the RIFO, the same must be true of the CRA — that under both, such legal reinterpretations would be "rules." (As discussed below, the Save the Internet Act would preclude the FCC from reissuing any "rule" similar to the RIFO.) But if this is true, it means that any such legal reinterpretation by an agency since 1996 never actually went into effect unless it was submitted to Congress in the report required by the CRA for all "rules" — like rulemakings. If not, this would undermine the legal basis for much of administrative law in the last 23 years.

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[5] *See* H.R.J. Res. 129, 115th Cong. (2018) (unenacted); *See also* S.J. Res. 48, 115th Cong. (2018) (unenacted).

[6] *See generally* TechFreedom, Congressional Letter, *In the Matter of Notice of Proposed Rulemaking Restoring Internet Freedom*, (May 14, 2018), http://docs.techfreedom.org/Letter_Net_Neutrality_CRA_Legal_Analysis_May_2018.pdf.

[7] *See generally* Berin Szóka, *What Harold Feld Doesn't Get About the CRA*, Tech Policy Corner (May 16, 2018), https://techpolicycorner.org/what-harold-feld-doesnt-get-about-the-cra-bd4ed32ce62b?gi=3b64f8ced0df.

In fact, Congressional Democrats protested loudly when Republicans used the CRA to override longstanding *de facto* rules contained in 2013 guidelines issued by the Consumer Financial Protection Bureau.[8] These were subject to challenge under the CRA, despite their age, because they were never submitted to Congress under the CRA, because the agency insisted at the time that they were merely guidelines, rather than rules requiring a rulemaking.[9] But the General Accountability Office (GAO) — an independent, non-partisan office — later concluded that the 2013 guidelines constituted "a general statement of policy and a rule under the CRA."[10] Rep. Maxine Waters (D-Calif.), Ranking Member of the House Financial Services Committee, called this "an inappropriate and misguided use of the Congressional Review Act that sets a dangerous precedent" — even though the CFPB guidelines clearly constituted a rule.

Now imagine the outrage Democrats would feel if Republicans attempted to claim that every legal reinterpretation made by an agency since 1996 was a "rule." Fortunately, this is simply not how the CRA works — and, presumably, Congressional Democrats would rush to say so in such a situation, despite making exactly the opposite argument in this context.

B. What the 2017 CRA Would Actually Have Done — and Not Done

The FCC's 2015 Order contained two parts:

1. **Order**: The underlying interpretation of Title II and Section 706 as granting the FCC the power to impose the Open Internet Rules on broadband services.
2. **Rule**: Issuance of the Open Internet Rules contained in Appendix A to the order, later codified in Part 8 of Title 47 of the Code of Federal Regulations; and

Similarly, the 2017 RIFO contained two parts:

1. **Order**: Reinterpretation of Title II and Section 706 that removed any legal basis for any other rules; and
2. **Rule**: Repeal of most of the 2015 rules, but reissuance of the transparency rule, with modifications.

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[8] *See* Zachary Warmbrodt, *House votes to kill CFPB auto-lending guidelines*, Politico (May 8, 2018), https://www.politico.com/story/2018/05/08/auto-lending-guidelines-consumers-house-521847.

[9] See Zachary Warmbrodt, *GOP maneuver could roll back decades of regulations*, Politico (April 17, 2018), https://www.politico.com/story/2018/04/17/congressional-review-act-fallout-485426.

[10] U.S. Gov't Accountability Off., B-329129, Bureau of Consumer Financial Protection: Applicability of the Congressional Review Act to Bulletin on Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act at 1 (2017) (letter to Sen. Patrick Toomey from G.A.O. General Counsel Thomas Armstrong) (available at https://www.gao.gov/assets/690/688763.pdf).

If, as we argue in the appendices, Congress can always reverse a rule (issued upon the delegation of Congress's legislative power) but cannot supersede agency's adjudicatory orders — *except to the extent that it could do so by passing new, specific legislation* — consider the perverse consequences of what H.R. 1644 would — and would not — do.

First, like last year's CRA, H.R. 1644 would void only that part of the 2017 RIFO that constitutes a rule — the reissuance of the transparency rule. Why would that not also void the RIFO's repeal of the other 2015 rules? Because the rulemaking aspect of repealing those rules was essentially a formality, a mere deletion of the rules from the Code of Federal Regulations: what really eliminated the rules was the FCC's holding — *in an order* — that it lacked authority for the issuance of those rules under either Title II or Section 706.

Second, the 2017 CRA would have had no effect on application of Title II or Section 706. Thus, the practical effect of the 2017 CRA resolution would have been worse than null: It couldn't have undone the FCC's re-reinterpretation of Title II and Section 706, so the FCC still would have lacked the power to issue (or enforce) the Open Internet Rules (fortunately, the FTC would have retained full power over what remained non-common-carrier services). In other words, the FCC would have been left with *no rules at all*.

C. The Retroactivity Red Herring

This is a complicated legal issue — one made even more by a footnote in the 2017 Order. One of the essential differences between (legislative) rules and (adjudicatory) orders is that rules can only ever have prospective effect, while orders can retrospective as well as prospective. The footnote in question (not addressed in our attached appendices) says:

> our classification decision arises from our reconsideration of past interpretations and applications of the Act. We thus conclude that the classification decisions in this Order appropriately apply only on a prospective basis. See, e.g., Verizon v. FCC, 269 F.3d 1098 (D.C. Cir. 2001) ("In a case in which there is a substitution of new law for old law that was reasonably clear, a decision to deny retroactive effect is uncontroversial.") (internal quotations omitted).[11]

One might argue that the FCC's statement that re-interpretation of Title II would only be forward-looking means that the FCC thought it was a rule, but the fact that the FCC even had to specify whether the interpretation would be retrospective proves that the FCC thought it had a choice, and that it decided not to claim retroactive effect. The 2001 case cited by the RIFO in the footnote quoted above further illustrates the adjudicatory nature of orders such as

[11] *RIFO* note 792.

those underlying the RIFO. Here is the passage that precedes the quote used in the FCC's footnote:

> This is not to say that agency adjudications that modify or repeal rules established in earlier adjudications may always and without limitation be given retroactive effect. To the contrary, there is a robust doctrinal mechanism for alleviating the hardships that may befall regulated parties who rely on "quasi-judicial" determinations that are altered by subsequent agency action. Over fifty years ago, in *SEC v. Chenery Corp.,* 332 U.S. 194, 203, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947), the Supreme Court cautioned that the ill effects of retroactivity "must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles."
>
> In the ensuing years, in considering whether to give retroactive application to a new rule, the courts have held that
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> > [t]he governing principle is that when there is a "substitution of new law for old law that was reasonably clear," the new rule may justifiably be given prospectively-only effect in order to "protect the settled expectations of those who had relied on the preexisting rule." *Williams Natural Gas Co. v. FERC,* 3 F.3d 1544, 1554 (D.C. Cir. 1993). By contrast, retroactive effect is appropriate for "new applications of [existing] law, clarifications, and additions." *Id.*
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> *Pub. Serv. Co. of Colo. v. FERC,* 91 F.3d 1478, 1488 (D.C. Cir. 1996) (*"PSCC"*). *See also Aliceville Hydro Assocs. v. FERC,* 800 F.2d 1147, 1152 (D.C. Cir. 1986) (discussing the distinction between "new applications of law" and "substitutions of new law for old law"). In a case in which there is a "substitution of new law for old law that was reasonably clear," a decision to deny retroactive effect is uncontroversial. *Epilepsy Found. of N.E. Ohio v. NLRB,* 268 F.3d 1095, slip op. at 12-13 (D.C. Cir. 2001).[12]

D. H.R. 1644's Attempt to Preclude Further FCC Rules

Since this bill is designed to look as much as possible like the CRA (for the political reasons explained above), it is not an accident that it mirrors the CRA's preclusion provision:

> Prohibition on Reissued Rule or New Rule.—The Commission may not reissue the Declaratory Ruling, Report and Order, and Order described in subsection (b) in substantially the same form, or issue a new rule that is substantially the same as

[12] *Verizon Telephone Companies v. F.C.C*, 269 F.3d 1098, 1109-10 (D.C. Cir. 2001).

> that Declaratory Ruling, Report and Order, and Order, unless the reissued or new rule is specifically authorized by a law enacted after the date of enactment of this Act.[13]

This is clearly intended to bar the FCC from simply reissuing the RIFO. However, it will fail, for the same reasons the 2017 CRA would have failed: neither can stop the FCC from exercising its quasi-judicial powers via new declaratory orders. The only thing this provision would do is, like the 2017 CRA, bar the FCC from reissuing a transparency rule that is "substantially similar" to that reissued in the RIFO.

II. Broadband Privacy

Perhaps the most striking thing about the Save the Internet Act is what it doesn't do: mention broadband privacy. Rewind to early 2017. Congressional Republicans seized on the CRA as a weapon for undoing "midnight regulations" issued by President Obama's agencies. (Whatever you think of the CRA or those particular regulations, this is exactly the scenario envisioned by the authors of the CRA when the law passed in 1994). Among the CRA resolutions that passed was one reversing the order passed by the FCC in late 2016 to create a bespoke privacy regulatory framework for ISPs completely different from how their collection and use of user data had been regulated by the Federal Trade Commission prior to the FCC's 2015 Open Internet Order.

The Obama-era FCC had argued, rightly, that it had to do *something* about broadband privacy because the OIO took away the FTC's jurisdiction when it declared Broadband Internet Access Service (BIAS) to be a Title II common carrier service, which is excluded from the FTC's otherwise-general consumer protection jurisdiction. As we argued at the time,[14] the FCC could simply have applied its own consumer protection powers under Section 201(b) case-by-case to mirror the FTC's approach, ensuring that net neutrality regulation would only have changed which agency dealt with broadband privacy, not the underlying standards. (Remember, the FCC's 2015 order supposedly had nothing to do with privacy). But Democrats (both on the FCC and in Congress) howled, insisting that consumers would be completely unprotected without specific rules on the books (just as they claimed the FTC couldn't police net neutrality case-by-case, as if the only way to "regulate" was to have a specific rule in the Code of Federal Regulations).

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[13] *See* A Bill to Restore the Federal Communications Commission's Open Internet Order and Its Net Neutrality Protections, S.682, 116th Cong. (2019).

[14] *See generally* Reply Comments of TechFreedom and CEI, *In the Matter of Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106 (July 6, 2016), *available at* https://cei.org/sites/default/files/tf_cei_reply_comments_fcc_privacy_nprm_7.6.2016.pdf.

It was a silly argument (other than the quite valid point that the Fair Notice Doctrine, grounded in constitutional due process principles, allows civil penalties to be imposed only where clear guidance is provided to regulated parties). But if Democrats meant it then, it's astounding that the Save the Internet Act doesn't say a word about privacy. If Congress really could raise regulatory orders from the dead, why not revive the 2016 Broadband Privacy Order too — or at least break the "spell" by which Congress barred the FCC from ever reviving that order?

The most obvious answer is political: adding authority over privacy rules to this bill (along with the required clear statutory language that BIAS and other aspects of the Internet are subject to Title II regulation) would complicate the simple "we're just reviving the 2015 Order" narrative, and alert the three Senate Republicans who supported the CRA to what is really going on — granting the FCC unbridled authority to set prices and adopt privacy rules, something Republicans have rightfully resisted for a decade.

III. This Bill Raises Constitutional Problems the CRA Doesn't

One might remain unconvinced by our analysis of what the CRA can and cannot do. It hardly matters, because the Save the Internet Act raises constitutional problems that the CRA doesn't. The CRA involves Congress blocking a regulatory action taken under authority issued by Congress. It can get messy if applied to orders, rather than rules, but when applied to rules, the CRA is relatively straightforward: the rules issued by the agency are void and the agency can't reissue them.

But the Save the Internet Act goes far beyond that. Instead of merely killing rules, it attempts to revive defunct rules and turn them into legislation. It's not hard to see how problematic this is. It's one thing to say Congress should "revive the 2015 Order" but simply passing a bill that actually says that and only that is completely unlike what Congress always does when it legislates: passing a single sentence referencing a 300+ page order instead of enacting specific language that can be codified in the United States Code.

We're not aware of any precedent for doing what H.R. 1644 would do — "legislating" without resulting in specific, codifiable statutory outputs. It's totally unclear how the FCC or the courts could implement and interpret this legislative approach. This approach is begging for a lawsuit arguing that, while Congress has plenary legislative powers, it has to actually pass *legislation*, not vague attempts to incorporate by reference some sprawling document issued by an agency.

Whatever would happen to such a legal challenge, one thing is likely: there wouldn't be a statute that the FCC could later claim to be interpreting when challenged in court on the application of its authority. Without that, the FCC wouldn't enjoy the kind of deference agencies normally get under the Supreme Court's *Chevron* decision. That would make it considerably harder for the FCC to enforce its rules — something no Democrat could actually want.

IV. Forbearance

The sponsors of the Save the Internet Act seem to disagree on whether their bill would bar, allow, or mandate broadband price regulation by the FCC — exactly the kind of confusion that comes with enacting something that isn't really legislation, and therefore lacks the clarity of laying out clearly what the FCC can and can't do.

Recall that the 2015 Order purported to "tailor" or "modernize" Title II by forbearing from nearly all of its provisions, leaving in place "only" the core powers the FCC needed to justify its rules. Tom Wheeler, the FCC Chairman at the time, insisted that this would avoid the potential for the FCC to regulate broadband prices, angrily attacking those who suggested otherwise. The potential for price regulation, and its effects on investment ad innovation, has always been the primary concern about Title II.

Last week, Rep. Yvette Clark (D-NY), insisted that the Save the Internet Act would, by locking in the 2015 Order, also lock in the Order's forbearance — and thus protect against FCC overreach. This is consistent with the Congressional Black Caucus's reasons for opposing Title II when the idea was first floated in 2010, worrying that any reduction in investment would hurt minority communities most.[15] But House Speaker Nancy Pelosi and Senate Minority Leader Chuck Schumer said the exact opposite: that consumers needed the FCC to regulate broadband prices, and their bill would allow them to do just that.

If the Save The Internet Act bill does allow the FCC to change the various forbearance pronouncements contained in the 2015 Order, which ones are subject to change? Could the FCC go farther, and forbear even further, all the way up to forbearing enforcement on any of the provisions of the 2015 Order? Or does the bill only allow the FCC to remove forbearance and apply more regulation to the Internet?

The fact that the core of the bill's sponsors can't agree on these bedrock concepts tells you why this approach to legislation is such a profoundly bad idea.

[15] *Cf.* House Democrats, Congressional Letter to FCC Chairman Genachowski, (May 24, 2010), https://web.archive.org/web/20110823032512/http://netcompetition.org/House_Democrat_Letter.pdf.

Whether a grant of forbearance is an adjudicatory decision was at issue in the legal challenges to the 2015 Order.[16] If it is, it is simply not subject to the CRA or to any other Congressional action that attempts to, like the CRA, strike down an agency order and preclude the agency from re-issuing it — for all the same reasons as above.

Regardless, this is really another red herring. Whether the FCC could undo the forbearance contained in the 2015 order, or whether that order is revised, the important fact remains this: the 2015 Order did *not* forbear from the core provisions of the Act, Sections 201(b) and 202(a) — which have always been the basis for the FCC's price regulation, and were basis for common carriage regulation under the Interstate Commerce Act of 1887.[17]

V. The Path Forward: Actual Substantive Legislation

Democrats have proposed *real* net neutrality legislation before. In 2010, FCC Chairman Julius Genachowski supported a legislative solution, and Henry Waxman, then chairman of the influential Government Oversight Committee, tried hard to get Republicans on board. Republicans blew the opportunity, dragging their feet in hopes of picking up seats in the midterm elections. They did, but by then, it was too late: the FCC had already issued its first Open Internet Order. Senator Maria Cantwell (D-WA) introduced a bill[18] derived from the Waxman bill in 2011, but since then, Democrats have simply moved from one excuse to the next *not* to introduce real legislation: waiting for the D.C. Circuit's 2014 *Verizon* decision (striking down the 2010 Order), then "letting the FCC work," then "letting the legal challenges play out in Court," then the CRA… and now this bill, which is effectively a rehash of the CRA fight.

In the meantime, Republicans have proposed legislation *four times* — each taking the Waxman bill or the 2015 Order as its starting point. Each of these bills has been attacked as "fake net neutrality" by Democrats. Yet it's the Republican bills that are actually serious about doing what the Democrats say they want: codifying the 2015 Order — with one big exception. Republicans have always objected to giving the FCC broad latitude to regulate Internet services as common carriers, because that could include things like price controls or anything else the FCC might dream up. Other than potential constitutional challenges, there's really no statutory limit to what the FCC could do with the Title II powers it claimed in 2015, not

[16] *Verizon & AT&T, Inc. v. FCC*, 770 F.3d 961, 966 (D.C. Cir. 2014) ("At oral argument, petitioners asserted that when the Commission determines whether to grant forbearance under section 10 it is engaged, under the APA, in an adjudication rather than a rulemaking.").

[17] *See* Comments of TechFreedom, *Notice of Proposed Rulemaking – Restoring Internet Freedom*, WC Docket No. 17-108, at 51-53 (Aug. 30, 2017), http://docs.techfreedom.org/TechFreedom_Reply_Comments_on_Open_Internet_Order.pdf.

[18] Internet Freedom, Broadband Promotion, and Consumer Protection Act, S.74, 112th Cong. (2011).

only over broadband but also other services that use IP addresses. And the FCC's 2010 claim that Section 706 is a free-standing grant of authority gave the FCC a separate, open-ended grant of power to do almost anything that falls short of common carriage regulation over not just broadband but *any* form of "communications."

As we've been saying since 2014, the contours of a legislative deal here are obvious: give the FCC the legal authority it needs to police net neutrality complaints so that the agency doesn't need to claim broader powers. That leaves some thorny questions to be resolved, most notably what kind of "general conduct standard" will govern cases that aren't covered by the bright-line rules (which everyone agrees on). But as long as that standard doesn't leave the barn door open for the FCC to claim the kind of powers conferred by Title II, a compromise should be relatively easy to hammer out.

* * *

We stand ready and willing to assist your committee with the drafting of legislation to resolve this issue so Congress can protect consumers while resolving lingering uncertainty over the authority of the FCC to regulate Internet services.

Sincerely,

Berin Szóka & James Dunstan[19]

[19] Berin Szóka is President of TechFreedom, a nonprofit, *nonpartisan* technology policy think tank. He can be reached at bszoka@techfreedom.org. James Dunstan is General Counsel of TechFreedom. He can be reached at jdunstan@techfreedom.org. This document could not have been completed without the assistance of Caden Rosenbaum, Legal Extern at TechFreedom and a law student at American University Washington College of Law.