Attachment—Additional Questions for the Record

Subcommittee on Communications and Technology
Hearing on
"Legislating to Safeguard the Free and Open Internet"
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The Honorable Anna G. Eshoo (D-CA)

1. **You have had a distinguished career when it comes to communications policy. I've always had a great deal of respect for you, even when we disagree, as we do on this issue. In 2014, you invited me to speak about this issue at an event. At the time, I said publicly that we've spent too long debating this—that was in 2014. Well, here we are, half a decade later, still working on it.**

   In your testimony, you point out that Title II is too heavy-handed for the internet. However, the FCC's 2015 Order forbore from 27 of 43 statutory provisions of Title II and over 700 association regulations, including forbearance from what many see as the utility-style and heavy-handed regulations that the Communications Act includes. Since H.R. 1644 codified this forbearance, what exactly is heavy-handed in this framework?

Response: Congresswoman Eshoo, thank you for this question. I have always enjoyed working with you and our constructive conversations. Sometimes we respectfully disagree but, at other times, we surprise observers when we do agree, which is more often than some realize. Indeed, you and I agree on the importance of being "cautious about heavy-handed regulation" and applying the full force of Title II to broadband service.[1] And, as you noted, there is no doubt that we've spent too long debating Internet network management regulations, or "network neutrality," without reaching a lasting bipartisan consensus.

As I said in my testimony, the approach the FCC adopted prior to issuing its first set of "open Internet" regulations was enormously successful. Light-touch regulation under Title I and other federal statutes[2] provided the certainty and stability that has led to the investment of more than $1.6 trillion in broadband infrastructure since the mid-1990s and, equally important, allowed the Internet's "edge" to flourish. By any measure, light-touch regulation was a boon to service providers, content providers, and consumers alike, and made America's Internet ecosystem the envy of the world.

[1] John Eggerton, Eshoo: FCC Can Find Title II-Lite Solution, Multichannel News (Mar. 28, 2018) *at* https://www.multichannel.com/news/eshoo-fcc-can-find-title-ii-lite-solution-383720 (last reviewed May 7, 2019).
[2] 15 U.S.C. § 15 (Clayton Act), 15 U.S.C. § 1 (Sherman Act), 15 U.S.C. §§ 41-58 (FTC Act).

That said, for the last decade that same Internet ecosphere has endured an environment of constantly changing rules. Frequent changes have had an effect on investment in broadband that cannot be ignored. In contrast, America's Internet economy could benefit from constructive, clear and understandable light-touch rules. If there are to be permanent regulations (I maintain that no new rules are needed, however), rather than adopting the onerous requirements of the FCC's 2015 order, the best place to start would be the principles laid out by FCC Chairman Michael Powell in 2005, which largely were endorsed by Chairman Julius Genachowski in 2010: no anticompetitive throttling, blocking or prioritization.[3]

Although, as you note, H.R. 1644 would impose some limits on the FCC's common carrier authority over broadband service, there are many areas where the FCC would retain full power and discretion to act. That creates loopholes and a significant potential for the kind of heavy-handed and counterproductive regulation I described in my testimony. Here's how:

- **The "general conduct" rule:** The bill would give the FCC full authority to regulate Internet service providers under a "general conduct" rule. The 2015 order adopted a rule that permitted the FCC to "prohibit, on a case-by-case basis, practices that unreasonably interfere with or unreasonably disadvantage the ability of consumers to reach the Internet content, services, and applications of their choosing or of edge providers to access consumers using the Internet."[4] This rule would give the FCC wide power to reinterpret and expand its "network neutrality" requirements after the fact, which would discourage investment, innovation and experimentation by broadband providers, and would erode the certainty that should be the goal of any legislation. In short, this open-ended grant of authority would swallow any other ostensible limitations put on the FCC by Congress.
- **Internet traffic exchange:** The 2015 order created a mechanism to resolve disputes about the terms for exchanging Internet traffic, but specifically declined to adopt "prescriptive rules," leaving the substantive requirements for traffic exchange to be decided in the future.[5] This approach would also give the FCC broad powers to apply a wide range of common carrier obligations to broadband providers when they exchange traffic with other broadband providers, CDNs, and content providers, and invite the FCC to regulate the prices for traffic exchange. This would create a new regulatory regime for peering and potentially the connectivity needed for cloud computing, creating an uncertainty that comes from regulatory overhang.
- **Section 201:** The 2015 order specifically declined to forbear from applying Section 201 of the Communications Act, which requires carriers to furnish service "upon reasonable request" and to offer their service on "just and reasonable" terms and conditions.[6] Although the order did forbear from applying existing rate regulations under Section 201

[3] *See* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al., *Policy Statement,* 20 FCC Rcd 14986 (2005) (setting open Internet principles); Preserving the Open Internet, *Report and Order*, 25 FCC Rcd 17905 (2010) (adopting rules based on 2005 principles).
[4] Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601, 5659-60 (2015) ("2015 Open Internet Order"*), aff'd United States Telecom Ass'n v. FCC*, 825 F3d 674 (D.C. Cir. 2016), *reh'g en banc denied*, No. 15-1063, 2017 WL 1541517, at *1 (D.C. Cir. May 1, 2017), *cert. denied*, Nos. 17-498 *et al.* (Nov. 5, 2018).
[5] *Id.* at 5692-93.
[6] 47 U.S.C. § 201(a), (b).

to broadband services and from adopting new rate regulations in the future, it did not forbear from case-by-case review of rates, or from adopting other types of rules under Section 201. Again, the bill's exception swallows the limitations and creates open-ended powers for the FCC to sever any ostensible tethers placed on it by Congress. With the bill, Congress would cosmetically limit powers on the one hand while contradicting those limitations with the other hand by granting unlimited powers that would supersede any alleged limits.

- **Section 202:** Section 202 of the Communications Act prohibits "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities or services."[7] Again, while the FCC did forbear from applying existing rate regulations under Section 202, it did not forbear from case-by-case review of rates or from adopting other Section 202 regulations. Again, the bill's exception creates open-ended powers for the FCC to sever any ostensible tethers placed on it by Congress. With the bill, Congress would cosmetically limit powers on the one hand while contradicting those limitations with the other hand by granting unlimited powers that would supersede any alleged limits.
- **Section 208 and other enforcement and complaint provisions:** The 2015 order did not forbear from any of the provisions of the Communications Act related to enforcement of its rules, through either third party complaints or the FCC's own actions.[8] Again, the bill's exception creates open-ended powers for the FCC to sever any ostensible tethers placed on it by Congress. With the bill, Congress would cosmetically limit powers on the one hand while contradicting those limitations with the other hand by granting unlimited powers that would supersede any alleged limits.
- **Section 222:** Although the FCC did forbear from applying its privacy rules to broadband services, it did not forbear from applying the underlying statutory provision, which left broadband providers to guess how they could comply.[9]
- **Universal service:** The FCC did not forbear from applying the Communications Act's central universal service provisions and implementing rules to broadband service, except for forbearing "from immediate contribution requirements" while the FCC considered what requirements it would apply.[10] This left broadband providers and consumers wondering if and when the FCC would adopt a new "tax" on broadband service.

This is not a comprehensive list of the requirements that the FCC left in place, but it highlights that the FCC intended to regulate broadband providers under a broad common carrier regime. Sections 201 and 202 are the core of the FCC's regulatory authority over common carriers, and the FCC left those obligations largely intact, except for pre-approval of rates, terms and conditions under its tariff rules. Nothing in the 2015 order prohibits the FCC from using its complaint and enforcement process to set limits on rates, to restrict terms and conditions of service, or to otherwise exercise broad powers over how broadband providers do business. In addition, the Electronic Frontier Foundation, which generally supports new "network neutrality"

[7] 47 U.S.C. § 202(a).
[8] 2015 Open Internet Order, 30 FCC Rcd at 5815.
[9] *Id.* at 5821-24.
[10] *Id.* at 5834-37.

regulations, warned the FCC that the general conduct rule would be "a recipe for overreach and confusion" unless it was narrowed significantly.[11]

In fact, in late 2016, the FCC began examining whether innovative wireless video offerings, like T-Mobile's Binge On, were prohibited by the 2015 order.[12] Thus, there is every reason to believe that the FCC would use the broad powers it reserved under the 2015 order to extend the reach of its authority over broadband services.

For these reasons, and others, I am concerned that the bill's alleged "limitations" on the FCC's power under Title II to regulate broadband Internet access service providers are illusory and that, in fact, the FCC's authority would be effectively unlimited in this regard. In short, the bill is not a "light touch" bill but, rather, the foundation for a powerful and onerous regulatory regime.

Thank you for this opportunity to respond to your Question for the Record.

[11] Corynne McSherry, *Dear FCC: Rethink The Vague "General Conduct" Rule,"* Electronic Frontier Foundation (Feb. 24, 2015) *at* https://www.eff.org/deeplinks/2015/02/dear-fcc-rethink-those-vague-general-conduct-rules (last visited May 7, 2019).
[12] Wireless Telecommunication Bureau, *Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero Rated Content and Services* (Jan. 11, 2017), http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0111/DOC-342987A1.pdf.