

The Committee on Energy and Commerce



Memorandum

January 19, 2015

To: Members, Subcommittee on Communications and Technology

From: Majority Committee Staff

Subject: Hearing on “Protecting the Internet and Consumers Through Congressional Action”

The Subcommittee on Communications and Technology will hold a legislative hearing Wednesday, January 21, 2015, at 10:00 a.m. in 2123 Rayburn House Office Building on “Protecting the Internet and Consumers Through Congressional Action.”

I. Witnesses

One panel of witnesses will testify:

1. Meredith Atwell Baker, President and CEO, CTIA-The Wireless Association;
 2. Chad Dickerson, CEO, Etsy;
 3. Jessica Gonzalez, Executive Vice President and General Counsel, National Hispanic Media Coalition;
 4. Paul Misener, Vice President of Global Public Policy, Amazon.com;
 5. Michael Powell, President and CEO, National Cable & Telecommunications Association;
- and,
6. Dr. Nicol Turner-Lee, Vice President and Chief Research and Policy Officer, Minority Media and Telecommunications Council.

II. Background

The regulation of the relationship between Internet service providers and end users has a long and complex history. The way in which that relationship is governed is premised on decades of regulatory and legislative decisions, beginning with the Federal Communications Commission’s (FCC) 1970s rules differentiating data services that processed information from those that simply transmitted information. The regulatory classification of Internet services forms the basis of the current net neutrality debate. The balance between consumers’ right to access the Internet in an open manner and the providers’ need to manage their networks to ensure effective functioning is a longstanding subject of regulatory and legislative discussions.

The basic principles of Internet consumer protection that eventually became known as net neutrality were first articulated in a 2004 speech from then-FCC Chairman Michael Powell. Chairman Powell set forth four “Internet freedoms” that consumers were entitled to: (1) access the lawful Internet content of their choice, (2) access legal services and applications, (3) connect lawful devices, and (4) have competition among providers of service and content. In the same

speech, he asserted that while Internet openness was a vital goal, government regulation was not necessary and could potentially harm innovation.¹

In 2005, under Chairman Kevin Martin, the Federal Communications Commission adopted a set of principles based on Powell's freedoms, intending them to serve as policy guidelines to promote the adoption and use of broadband Internet services.² However, in 2008, the FCC attempted to enforce these principles when it ordered a broadband provider to cease certain network management practices and adhere to the principles.³ In *Comcast Corp. v. FCC*,⁴ the U.S. Circuit Court for the D.C. Circuit ("D.C. Circuit") ruled that the FCC did not demonstrate the statutory authority necessary to issue the order.

As the Court was deliberating the *Comcast* case, the FCC, under the direction of Chairman Julius Genachowski, was working to promulgate new net neutrality rules by codifying the principles under a different theory of statutory authority. Following the Court's decision, the FCC proposed in 2010 papers by Chairman Genachowski and then-FCC General Counsel Austin Schlick to reclassify broadband Internet access service as a telecommunications service, subject to the common carrier rules of Title II of the Communications Act.⁵ Ultimately, in its 2010 Order, the Commission relied instead on Section 706 of the Telecommunications Act of 1996 as a statutory grant of authority.⁶ The 2010 Order imposed requirements for disclosure and transparency on providers, and banned blocking and discrimination of network traffic, subject to reasonable network management. The rules differentiated between fixed broadband providers—

¹ Remarks of Michael K. Powell, Chairman, Federal Communications Commission, Feb. 4, 2004 available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf.

² *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Policy Statement, 20 FCC Rcd 14986, 14987–88, para. 4 (2005).

³ *See Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management,"* File No. EB-08-IH-1518, WC Docket No. 07-52, Memorandum Opinion and Order, 23 FCC Rcd 13028 (2008).

⁴ 600 F.3d 642 (D.C. Cir. 2010).

⁵ "The Third Way: A Narrowly Tailored Broadband Framework", Julius Genachowski, Chairman, Federal Communications Commission, May 6, 2010 available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-297944A1.pdf; "A Third-Way Legal Framework for Addressing the Comcast Dilemma", Austin Schlick, General Counsel, Federal Communications Commission, May 6, 2010 available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-297945A1.pdf.

⁶ *Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17910, para. 13 (2010), *aff'd in part, vacated and remanded in part sub nom. Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

typically those providing service to the home—and mobile broadband providers, based on the technological differences in the two platforms.

The rules were again challenged in court on the grounds that the FCC lacked statutory authority, the decision to implement the rules was arbitrary and capricious, and that the rules were in violation of laws prohibiting the FCC from treating broadband providers as common carriers. In January 2014, the D.C. Circuit in *Verizon v. FCC* upheld the Commission's rule requiring broadband providers to disclose network management practices, but struck down the FCC's rules banning blocking and unreasonable discrimination.⁷ Unlike previous challenges, the court ruled that the FCC had made an affirmative case that it has the authority under Section 706 to regulate broadband network management practices, and found that the rules as adopted were essentially common carrier regulations, which conflicted with prior Commission decisions classifying broadband as a non-common carriage information service.⁸

Following the Court's decision to partially overturn the Open Internet rules in *Verizon*, the FCC launched a proceeding on May 15, 2014 to seek public comment on how to implement net neutrality rules.⁹ The May 2014 Notice of Proposed Rulemaking sought comment on the various options for legal authority for implementing rules.

In November 2014, President Barack Obama called on the FCC to enact strong net neutrality rules, including no blocking, no throttling, increased transparency, and no paid prioritization. The President also called for mobile broadband service to be included, and acknowledged that there should be some exceptions for reasonable network management and specialized services.¹⁰

Recent statements from Chairman Wheeler indicate that the Commission intends to move forward with an order reclassifying broadband Internet services at the February 2015 Open Meeting.¹¹

III. Committee Discussion Draft

On January 16, 2015, the Committee released a discussion draft of legislation that would restore, expand, and bolster the Commission's 2010 net neutrality rules in statute.

The draft legislation:

- Applies to both fixed and wireless forms of broadband Internet access service;

⁷ 740 F.3d 623 (D.C. Cir. 2014).

⁸ *Id.* at 649-59.

⁹ *Protecting and Promoting an Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, 29 FCC Rcd. 5561 (2014).

¹⁰ "Net Neutrality: President Obama's Plan for an Open Internet" *available at* <http://www.whitehouse.gov/net-neutrality>.

¹¹ *See, e.g.* Reardon, Marguerite and Downes, Larry, "Mark your calendars: FCC to hold Net neutrality vote of Feb. 26", *cnet.com* (Jan. 7, 2015) *available at* <http://www.cnet.com/news/fcc-chairman-confirms-net-neutrality-vote-for-february/>.

- Prohibits blocking lawful content, applications, or services;
- Prohibits blocking of non-harmful devices;
- Prohibits throttling Internet traffic by selectively slowing, speeding, degrading, or enhancing traffic based on the source, destination, or content;
- Bans paid prioritization of traffic, defined as the speeding up or slowing down traffic based on compensation, or lack thereof, from the sender to the ISP; and,
- Retains and codifies the FCC's current requirement that providers be transparent in disclosing their network management practices, performance, and the commercial terms of its service, in order to allow consumers to make informed decisions about their choice of providers.

The legislation directs the FCC to enforce these obligations by adopting formal complaint procedures and to interpret and apply them by adjudicating alleged violations.

The draft also provides certainty for investment and innovation by:

- Foreclosing future FCC rulemaking to change the bright-line rules for Internet openness;
- Clarifying that nothing in the bill limits the ability of consumers to make decisions about their plans or service;
- Permitting providers to offer specialized services, so long as those services are not offered in a way that threatens availability of broadband Internet access services or attempts to evade the purposes of this legislation; and,
- Restoring congressional intent that Section 706 of the Telecommunications Act of 1996 is not a direct grant of authority, as it was understood before the 2014 *Verizon* decision.

Finally, the draft proposes to codify broadband Internet access service's classification as an information service. Broadband Internet has been an information service since the early 2000s when the FCC undertook a series of orders to classify it as such, and defended its decisions all the way to the U.S. Supreme Court.¹²

By retaining the information service classification that exists today, rather than ban the use of Title II as some have suggested, the draft would change nothing about the current regulation of broadband, including the ability of the Commission to address issues like public safety, disabilities access, and others through its ancillary authority. This approach also avoids the time-consuming and uncertain forbearance process that net neutrality advocates concede will be necessary should the FCC act to reclassify.

If you need more information, please call David Redl or Kelsey Guyselman at (202) 225-2927.

¹² *Nat'l Cable & Telecomm. Ass'n, et al. v. Brand X Internet Services, et al.*, 545 U.S. 967 (2005)