U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON ENERGY AND COMMERCE

February 23, 2015

To: Members, Subcommittee on Communications and Technology

From: Majority Committee Staff

Subject: Hearing on "The Uncertain Future of the Internet"

I. INTRODUCTION

The Subcommittee on Communications and Technology will hold a hearing Wednesday, February 25, 2015, at 10:30 a.m. in 2322 Rayburn House Office Building on "The Uncertain Future of the Internet." The purpose of this hearing is examine the legal, economic and policy uncertainties created by the FCC's proposed action to reclassify broadband Internet access services as a telecommunications service subject to Title II of the Communications Act of 1934.

II. WITNESSES

The following witnesses will testify at the hearing:

- Robert Atkinson, Founder and President, Information Technology and Innovation Foundation
- The Honorable Rick Boucher, Honorary Chairman, Internet Innovation Alliance
- Larry Downes, Internet industry analyst and author
- Gene Kimmelman, President and CEO, Public Knowledge

III. BACKGROUND

A. History of Regulation of Broadband Internet Access

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.

As the Internet entered the commercial sector and Internet access became a mainstream commercial product, the U.S. government faced a fundamental question: should this new network of networks be treated under the law governing the legacy telephone networks —laws that were first articulated in 1934 and used to regulate a government-granted monopoly — or should the government take a hands-off approach, letting the Internet grow free from the

common carrier regulatory regime used to regulate telephony? Through the concerted efforts of the FCC and the administration of President Bill Clinton, policies were put in place to ensure that the Internet would not be subject to common carrier regulation under Title II.

There was bipartisan agreement then that the Telecommunications Act of 1996 recognized, as then-FCC Chairman Bill Kennard described it, "the failure of legacy regulation."[1] However, this didn't mean the Internet would be completely free from government oversight. As Former FCC Chairman Michael Powell later articulated, "[w]e believe that it was an important architecture and the government should have a degree of oversight."[2] This view lead to the basic principles of Internet consumer protection that eventually became known as "net neutrality" and were first articulated in a 2004 speech by 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.[3]

In 2005, under Chairman Kevin Martin, the Federal Communications Commission adopted a set of principles based on Powell's freedoms. These principles were intended as policy guidelines to promote the adoption and use of broadband Internet services.[4] At the time of their adoption, Chairman Martin stated that the principles were not enforceable and that the competitive marketplace would preclude the need for any regulation. However, in 2008, the enforceability of these principles was tested when the FCC attempted to order a broadband provider to cease certain network management practices and adhere to the principles.[5] In

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[1] Downes, Larry, "Calling America's New Digital Policy Pioneers", FORBES, *available at* http://www.forbes.com/sites/larrydownes/2014/01/03/the-bi-partisan-digital-policy-pioneers/ (Jan. 3, 2014).
[2] *Id*.
[3] Remarks of Michael K. Powell, Chairman, Federal Communications Commission, *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf (Feb. 4, 2004).
[4] *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).
[5] *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).

Comcast Corp. v. FCC (2010),[6] 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 initially proposed reclassifying broadband Internet access service as a telecommunications service, subject to the common carrier rules of Title II of the Communications Act.[7] Ultimately, the Commission relied instead on Section 706 of the Telecommunications Act of 1996 as a statutory grant of authority.[8] 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—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 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.[9] Unlike previous challenges, the court ruled that the FCC had demonstrated 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."[10]

Following the Court's decision to partially overturn the Open Internet rules, the FCC launched a proceeding to seek public comment on how to implement net neutrality rules. The May 2014 Notice of Proposed Rulemaking sought comment on the various options for legal authority for implementing rules.[11]

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[6] 600 F.3d 642 (D.C. Cir. 2010).
[7] *"The Third Way: A Narrowly Tailored Broadband Framework"*, Julius Genachwoski, Chairman, Federal Communications Commission, *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-297944A1.pdf (May 6, 2010); *"A Third-Way Legal Framework for Addressing the Comcast Dilemma"*, Austin Schlick, General Counsel, Federal Communications Commission, *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-297945A1.pdf (May 6, 2010).
[8] *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).
[9] *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).
[10] *Id*. at 649-59.
[11] *Protecting and Promoting an Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, 29 FCC Rcd. 5561 (2014).

In November 2014, President Barack Obama weighed in on the net neutrality debate calling on the FCC to enact strong 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.[12]

In January 2015, Energy and Commerce Committee Chairman Fred Upton and Subcommittee on Communications and Technology Chairman Greg Walden released a draft bill to codify the tenets of net neutrality described by the President: no blocking, no throttling, no paid prioritization, and transparency requirements for Internet service providers.[13] The legislation applies to both wireless and wireline broadband and would classify broadband Internet access service as an information service under the Communications Act. The Committee held a hearing on the draft legislation on January 21, 2015.

Chairman Wheeler announced in January 2015 that the Commission would move forward to adopt an order reclassifying broadband Internet services at the February 26, 2015 Open Agenda Meeting. Despite calls for transparency from Chairman Upton, Chairman Walden, and Senate Committee on Commerce, Science and Transportation Chairman John Thune, Chairman Wheeler has advised the Committee that the text of the Order that will be voted on at the Commission's meeting will not be available to the public until after the Commission has voted and Commission staff has had time to make technical changes to the item for publication in the Federal Register.

B. The Proposed Reclassification of Broadband

The FCC's proposed plan to reclassify broadband as a telecommunications service injects a great deal of uncertainty into the future of the Internet – uncertainty that Republicans and Democrats have sought to avoid for two decades. This hearing will examine some of the consequences that could arise from the Commission's proposed course of action.

As a threshold matter, it is notable that much of the uncertainty surrounding what the Commission will do could have been avoided if the FCC's process were more transparent. As noted above, under the FCC's rules, the Chairman of the Commission is unilaterally empowered to decide whether the public can see the text of a proposed Order.[14] Absent such a decision, Commission Orders are proposed by the Chairman, amended in secret (a process known as "white copying" and "circulation"), and voted before the public is permitted to see the proposed rules. The public is left to rely on an editorial by the Chairman of the FCC,[15] a "fact sheet"

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[12] "Net Neutrality: President Obama's Plan for an Open Internet" *available at* http://www.whitehouse.gov/net-neutrality.
[13] http://docs.house.gov/meetings/IF/IF16/20150121/102832/BILLS-114pih-NetNeutrality.pdf
[14] 47 C.F.R. 19.735-203.
[15] "FCC Chairman Tom Wheeler: This Is How We Will Ensure Net Neutrality", Wired.com *available at* http://www.wired.com/2015/02/fcc-chairman-wheeler-net-neutrality/ (Feb. 4, 2015).

issued by his office,[16] and the public comments of other FCC Commissioners to divine the path ahead for the Internet.[17]

Looking beyond the questions of what the FCC will do, the FCC's reclassification will almost certainly result in legal action. Regardless of the policies behind the FCC's regulations, all parties recognize that lawsuits challenging the legality of the Commission's action are inevitable. Corporate CEOs and trade association leaders ranging from the wireless industry to small cable providers have indicated that they intend to pursue legal action in response to the new regulations.[18] Court proceedings will take a great deal of time to resolve, creating uncertainty in the market and for consumers.

There are also concerns that onerous government regulation of networks, and resulting uncertainty, can have a substantial depressive effect on deployment, upgrades, and innovation. The European Union has long relied on extensive regulation of the Internet by requiring operators to make their networks available to competitors at a regulated price. As a result of this government regulation, investment and competition throughout Europe is significantly lower than that in the United States, which has historically taken a light-touch regulatory approach to Internet service. According to a new study from the Internet Innovation Alliance, during the years of 2011 and 2012 U.S. broadband providers invested $137 billion in their networks while European providers have invested just $31 billion. The study also states that 76 percent of American households have access to three or more broadband providers while less than 50 percent of European households have those options, despite the EU's favorable population density and geography. This data indicates that the utility-style regulation the Commission is contemplating does not encourage innovation. In fact, as of 2013 the EU has recommended that in order to encourage future network investment it move to a lighter regulatory approach similar to the approach the U.S. has taken since the Clinton administration.

In addition to the domestic consequences to reclassification, there are also questions about how this decision will impact international regulation of the Internet. There are increasing concerns that reclassification could be sending the wrong message to the international Internet governance community about the United States' stance on government regulation of the Internet.[19] In 2010, Ambassador Phil Verveer, now a senior advisor to Chairman Tom Wheeler, articulated his concerns with then-FCC Chairman Julius Genachoski's proposal to enact net neutrality through reclassification, saying that the potential regulations could be used by other countries as "a pretext or as an excuse for undertaking public policy activities that we would

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[16] http://www.fcc.gov/document/chairman-wheeler-proposes-new-rules-protecting-open-internet ("Fact Sheet").
[17] *See, e.g.* Comm. Pai's Statement on President Obama's Plan to Regulate the Internet *available at* http://www.fcc.gov/document/comm-pais-stmt-president-obamas-plan-regulate-internet (Feb. 6, 2015).
[18] *See, e.g.* Testimony of Meredith Atwell Baker, President and CEO, CTIA – The Wireless Association *available at* http://docs.house.gov/meetings/IF/IF16/20150121/102832/HHRG-114-IF16-Wstate-BakerM-20150121-U1.pdf (Jan. 21, 2015).
[19] *See, e.g.* McDowell, Robert and Goldstein, Gordon, "Dictators Love the FCC's Plan to Regulate the Internet" WALL ST. J. (Feb. 17, 2015).

disagree with pretty profoundly."[20] Moreover, reclassifying broadband as a "telecommunications service," may have implications for U.S. treaty obligations and our relationship with the International Telecommunication Union.[21]

Additionally, a number of the provisions that Chairman Wheeler has outlined in his statements and the FCC's fact sheet raise additional legal questions:

- *How Will the Commission Forbear?* In the Telecommunications Act of 1996, Congress added section 10 to the Communications Act of 1934 ("the Act"), permitting the FCC to forbear from the application of certain portions of the Act. While the FCC has stated that it intends to forbear or refrain from applying many parts of Title II, there is little assurance for industry in the long term.[22] Forbearance is a legal action that requires a specific and statutorily defined showing of fact and can be challenged in court. Moreover, it can be reversed or overturned by future FCCs, subjecting ISPs to provisions that were never intended to apply. Finally, forbearance requires that the Commission affirmatively show that the provisions from which it intends to forbear are not necessary to protect consumers and that forbearance is in the public interest.[23] It is unclear how the Commission intends to show that certain provisions are unnecessary nationwide without a market-by-market analysis and whether in some cases such a finding would conflict with the Commission's rationale underscoring efforts to impose new net neutrality rules on broadband Internet access service ("BIAS").

- *Can The FCC Forbear from Regulating Rates if it Reclassifies?* The Chairman has repeatedly stated that the Commission is not going to regulate rates for BIAS or interconnection, but it is not clear that this is an assurance that the Chairman can make.

  There are two ways the Commission regulates rates: through its tariffing authority and through its authority to prohibit unjust and unreasonable rates. Whereas tariffing is before-the-fact regulation of rates, the Commission's authority to regulate through the adjudication of complaints provides for after-the-fact regulation of rates. According to the Chairman's fact sheet and statements by both the Chairman and other Commissioners, it appears that the Order reclassifying broadband would apply sections 201 and 202 to BIAS, which includes the Commission's authority over unjust and unreasonable rates.

  Some net neutrality advocates claim that the Commission can use its forbearance authority to forbear from the word "rates" and thus avoid this uncertainty in the future. However, Section 10 of the Act permits the Commission to forbear from provisions, not words, and only when certain criteria have been met. To read the Commission's forbearance authority to permit forbearance from words would turn forbearance authority on its head and would write Congress and congressional intent out of the Act. Under such

[20] Eggerton, John, "FCC's Net Neutrality Proceeding Means More Work for State Department", Broadcasting & Cable *available at* http://www.broadcastingcable.com/news/washington/fccs-net-neutrality-proceeding-means-more-work-state-department/57276 (Mar. 17, 2010).
[21] McDowell, *supra* note 19.
[22] Fact Sheet, *supra* note 16.
[23] 47 U.S.C. §160

an interpretation the Commission could simply forbear from the word "not" and reverse the meaning of the law. Because the Commission's authority to regulate what it deems unjust and unreasonable rates is intertwined with the authority the Commission intends to rely on for regulating unjust and unreasonable practices, the Commission faces two options: forbear from regulating rates and also forbear from regulating practices, or engage in the lengthy and uncertain process of adjudicating every complaint that it gets from consumers about the reasonability of rates.

- *Will Reclassification Result in New Fees on Internet Bills?* The Chairman and his advisors have also repeatedly claimed that there will not be new charges on customers' bills for Internet access service. Current law suggests, however, that the Chairman cannot make this assurance.

  Section 254(d) of the Communications Act requires that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis" to the Universal Service Fund.[24] Universal Service Fund contributions are determined by dividing the fiscal needs of the Fund by the projected interstate telecommunications revenue of telecommunications carriers, who in turn pass the fee on to subscribers as a percentage of their monthly bill. By reclassifying BIAS as a telecommunications service, and by virtue of the Internet's recognized interstate nature, the Commission will be compelled by statute to assess Universal Service contributions on the fees paid for BIAS. According to the Progressive Policy Institute, these and other fees that will come with reclassification could total as much as $11 billion per year.[25] Net neutrality advocates claim that estimates of the consumer cost are inflated and that the Internet can be shielded from increased taxes and fees through classification and a permanent extension of the Internet Tax Freedom Act. However, much uncertainty exists as to whether these proposed solutions would actually shield the Internet from additional taxes and fees.[26] Even a recent Washington Post article, while taking exception to the figures put forward by the PPI study, acknowledges the uncertainty surrounding how the FCC's plan would impact consumers' bills.[27]

  Some net neutrality advocates argue that, just as with rate regulation, the Commission could simply opt to forbear from a sentence in section 254(d), jettisoning the mandatory

[24] 47 U.S.C. §254(d).
[25] Singer, Hal and Litan, Robert, "Outdated Regulation Will Make Consumers Pay More for Broadband", Progressive Policy Institute, *available at* http://www.progressivepolicy.org/wp-content/uploads/2014/12/2014.12-Litan-Singer_Outdated-Regulations-Will-Make-Consumers-Pay-More-for-Broadband.pdf.
[26] Singer, Hal and Litan, Robert, "No Guarantees When It Comes to Telecom Fees", Progressive Policy Institute, *available* at http://www.progressivepolicy.org/issues/economy/no-guarantees-when-it-comes-to-telecom-fees/ (Dec. 16, 2014).
[27] Ye Hee Lee, Michelle, "Will the FCC's net neutrality decision cost Americans $15 billion in new taxes? Nope", WASH. POST, *available at* (Jan. 20, 2015) (*stating that* "*[t]here are too many unknowns to alarm consumers who are not well-versed in the technical and legal details of telecommunications regulations and laws. Given the uncertainties, it would be more appropriate to give a range of potential charges.*").

language requiring nondiscriminatory contributions, but retaining the flexibility permitted to the Commission in the remainder of the subsection. Just as described above, it is unclear that the Commission can forbear from a sentence, picking and choosing how it would like each subsection to read. At a minimum, such an interpretation by the Commission is likely to result in additional litigation.

- *How Will The FCC Include Wireless?* Chairman Wheeler has stated that the new Title II rules for BIAS will include service provided by commercial mobile radio service — wireless — providers.[28] However, there is significant uncertainty that the Commission has the authority to do so. Congress in the Omnibus Reconciliation Act of 1993 added section 332 to the Act, prohibiting the Commission from treating wireless as a common carrier except to the extent it is engaging in the provision of services connected to the telephone network.[29] The FCC and the courts have consistently held that this prevents the FCC from imposing common carriage regulations on wireless broadband.[30]

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In addition to the above concerns, questions remain about increased costs, potential for state regulation of ISPs, regulation of rates, and increased administrative and operational burdens, particularly for smaller ISPs. This hearing is intended to explore and discuss the uncertainty these potential outcomes impose on the Internet and alternatives for achieving the goals of net neutrality.

IV. STAFF CONTACTS

If you have any questions regarding this hearing, please contact David Redl or Kelsey Guyselman of the Committee staff at (202) 225-2927.

[28] Fact Sheet, *supra* note 16.
[29] 47 U.S.C. §332.
[30] *See Cellco P'Ship v. FCC*, 700 F.3d 534, 544 (D.C. Cir. 2012) (*stating that section 332 presents a "statutory exclusion of mobile-internet providers from common carrier status."*); *see also Verizon*, 740 F.3d at 650 (*stating that "treatment of mobile broadband providers as common carriers would violate section 332."*).