

Attachment—Additional Questions for the Record
Subcommittee on Communications and Technology
Hearing on
“Preserving an Open Internet for Consumers, Small Businesses, and Free Speech”
February 7, 2019

Mr. Michael Powell, President and CEO, NCTA—The Internet & Television Association

The Honorable Anna G. Eshoo (D-CA)

- 1. In your written testimony, and many times during the hearing, you asked that Congress create a new statutory framework to regulate broadband, instead of reverting to classifying broadband as a “telecommunication service” regulated under Title II of the Communications Act, as the FCC’s 2015 Open Internet Order did. In addition to classifying broadband as a “telecommunication service,” the FCC’s 2015 Order also states that the FCC “exercise[d] the Commission’s forbearance authority to forbear from application of 27 provisions of Title II of the Communications Act, and over 700 Commission rules and regulations.”**
 - a. For the record, please provide a list of all remaining provisions of Title II that were applicable to your member companies after the FCC’s forbearance in the 2015 Order. Of these statutory and regulatory requirements, which specific provisions do you propose Congress exclude from a new statutory framework for broadband? Please also specify which of these provisions you believe should be subject to rulemaking authority or simply subject to Commission enforcement action.**

Response: “Title II” consists of much more than the provisions enumerated in the statute. To understand its full impact, one must take note of the thousands of regulations and common law precedents developed since the 1930s to regulate the landline telephone system. In the 2015 Open Internet Order, the Commission conducted forbearance only at the statutory level. It left muddy and unresolved the myriad questions about which parts of this massive body of telephone law applied to broadband providers. Such an exercise would inevitably take years, if not decades, to resolve.

Even at the statutory level, the Commission left in place a host of regulatory requirements. Those provisions include Sections 201, 202, 206, 207, 208, 209, 214(e), 216, 217, 222, 224, 225, 251(a)(2), 254 (except the first sentence of subsection (d), as well as subsections (g) and (k)), and 255.

It is critical to highlight the fact that while the Commission claimed it forbore from rate regulation, it in fact did not. It clearly left in place provisions that would allow it to pass

judgment on broadband prices in an adjudicatory proceeding. Moreover, it retained provisions that authorize class action lawsuits in federal court, challenging the prices charged in the broadband market. While the Commission did forbear from rules requiring ISPs to file tariffs, it preserved the power to regulate rates through other procedures. Any claim that the 2015 Order guaranteed “no regulation of rates” is simply untrue.

None of the Title II provisions should be included in new legislation. The rotary-phone-era assumptions underlying Title II are simply not valid or logical when applied to the modern internet. Moreover, Title II is entirely distinct from net neutrality and is an unnecessary precondition for Congress to establish strong net neutrality requirements backed by robust agency enforcement and oversight. Instead, Congress should use its constitutional power to create new legal authority, enshrining core net neutrality safeguards for consumers without sacrificing the flexibility needed for all market participants to retain incentives to invest, innovate, and prosper. Any policy embodied in a provision of Title II that might have value in a modern context could be thoughtfully considered and potentially included in a new title specifically designed for net neutrality and the internet. Dumping a mountain of old rules on the market and then hoping we can lighten the impact by chipping away unwanted provisions makes little sense. It is far better to start on a clean page and be thoughtful about what to put on that page, avoiding the pronounced danger of impacts from legacy regulations that are impossible to foresee clearly.

Attachment—Additional Questions for the Record

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The Honorable Tony Cárdenas (D-CA)

1. Since the Trump Administration signed the Tax Scam into law, investment in broadband infrastructure has not increased. According to a February 7, 2019 article in the *Financial Times*, the big four US broadband companies invested \$56.1 billion in 2016 and \$57.1 billion in 2017 in capital projects. In 2018, after the Tax Scam went into effect, the companies invested \$56.9 billion.

a. Can you explain why investment in broadband infrastructure has not increased since the Tax Scam took effect?

Response: These companies are large and diverse. They spend capital on many things besides their networks, including video services, new products, and facilities. Therefore, looking at total capital expenditures is not informative in assessing the impact of net neutrality rules. One must look specifically at the amount of capital spending directed to network investment and how it has changed.

The figures cited above are measures of total expenditures, and do not separately break out infrastructure investments made by broadband providers in expanding and enhancing their networks. In fact, network expenditures increased in 2018 for Comcast (+4%) and Charter (+13%), the two largest cable broadband providers (offset in the totals cited above by a decrease in spending on video-related customer premises equipment). Both companies also provided guidance to the investor community that network capital expenditures are likely to grow again in 2019.

Indeed, capital expenditures by cable broadband providers, which eclipsed \$20 billion in 2017 and 2018, enabled our industry to complete major network upgrades, deploying gigabit service to virtually their entire footprints. Specifically, cable providers expanded the reach of residential gigabit cable broadband service from only 4% of U.S. housing units in December 2016 to 80% of U.S. housing units in December 2018.

Moreover, in January 2019, the cable industry announced its 10G initiative to deliver 10 Gigabit per second speeds to American households. Lab trials are already under way and field trials are expected to commence in 2020. Similarly, the wireless industry has equally dramatic plans for transitioning to 5G networks—a massive, multi-year expansion of investment. These are very substantial, long-term plans to dramatically increase network capability and clearly evidence the industry's growing commitment to infrastructure investment and network innovation.