WRECKING THE INTERNET TO SAVE IT? THE FCC'S NET NEUTRALITY RULE

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WRECKING THE INTERNET TO SAVE IT? THE FCC'S NET NEUTRALITY RULE

WEDNESDAY, MARCH 25, 2015

HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
Washington, DC.

The Committee met, pursuant to call, at 2:07 p.m., in room 2141, Rayburn Office Building, the Honorable Bob Goodlatte (Chairman of the Committee) presiding.

Present: Representatives Goodlatte, Smith, Chabot, Issa, Forbes, King, Franks, Gohmert, Jordan, Poe, Marino, Collins, DeSantis, Walters, Buck, Ratcliffe, Bishop, Conyers, Nadler, Lofgren, Jackson Lee, Cohen, Johnson, Chu, Deutch, Richmond, DelBene, Jeffries, Cicilline, and Peters.

Staff Present: (Majority) Shelley Husband, Chief of Staff & General Counsel; Branden Ritchie, Deputy Chief of Staff & Chief Counsel; Allison Halataei, Parliamentarian & General Counsel; Kelsey Williams, Clerk; Anthony Grossi, Counsel; (Minority) Perry Apelbaum, Staff Director & Chief Counsel; Danielle Brown, Parliamentarian; James Park, Counsel; and Rosalind Jackson, Professional Staff Member.

Mr. GOODLATTE. Good afternoon. The Judiciary Committee will come to order. Without objection, the Chair is authorized to declare recesses of the Committee at any time.

We welcome everyone to this afternoon's hearing on "Wrecking the Internet to Save It? The FCC's Net Neutrality Rule," and I will begin by recognizing myself for an opening statement.

On February 26, the Federal Communications Commission voted 3-to-2 along party lines to approve the commission's new Open Internet order. FCC Chairman Wheeler argues that this order will preserve and protect the Internet as a platform for innovation, expression, and economic growth. He claims that the order will not raise Internet service costs, slow broadband speeds, reduce investment, limit consumer choice, or let the government regulate rates.

Chairman Wheeler also asserts that the commission's dramatic, last-minute departure from the FCC's proposed rule was made independently without undue White House influence and was consistent with the Administrative Procedure Act.

Today's hearing will challenge each and every one of these assertions. The order will undoubtedly raise Internet service costs. The text specifically permits the FCC to impose additional fees, raises the rate carriers must pay to deploy broadband, and opens the door

to higher State and local taxes. The result is an estimated $11 billion in new taxes and fees.

This estimate, moreover, does not include regulatory compliance costs. An army of lawyers and accountants will be required to comply with the 300-plus page order and the dizzying array of additional regulations, proceedings, and opinions that it contemplates. The order will also slow broadband speeds.

Europe already imposes utility-style regulation on its broadband providers. As result, Europe trails America in virtually every measurable category relating to Internet speed and deployment. Indeed, Europe is thrilled that the FCC is leveling the competitive playing field. The Secretary General of the European Policy's Party recently remarked that the FCC was about to impose the type of regulation which has led Europe to fall behind the U.S. in levels of investment.

The FCC's order will reduce consumer choice. A group of 142 wireless Internet service providers, 24 of the country's smallest ISPs, and the Small Business and Entrepreneurship Council all urged the FCC not to impose Title II regulation, because it would hinder our ability to further deploy broadband, erode investment and innovation, and badly strain our limited resources.

These are the types of companies that serve small and rural communities, like many in my district, and the FCC's regulations threaten their very livelihood. Forcing companies out of business rarely results in more consumer choice.

The FCC's order will discourage investment. Nothing chills investment faster than regulatory uncertainty, and this order is the very definition of it. It allows the FCC to regulate virtually any activity it deems to have violated its vaguely worded, seven-factor "Internet conduct" standard.

Chairman Wheeler describes this new authority as "sitting there as a referee and being able to throw the flag." What he doesn't tell you is that he won't be the only one who can throw the flag. Hoards of trial lawyers will now have the ability to file a suit in any Federal court in the country claiming violations of the new, vague conduct standard.

Additionally, there is uncertainty regarding the validity of the FCC's order itself, which has already been challenged in court. The last time the FCC acted in this area, it took over 3 years for the courts to largely invalidate the FCC's net neutrality rule.

Chairman Wheeler told other congressional Committees that the order does not allow the FCC to regulate rates. Chairman Wheeler further argues that his commission will set precedent that will make it more difficult for future commissions to regulate rates. Yet, it is this very commission that has overturned decades of precedent to categorize Internet service under Title II. Obviously, precedent does not carry much weight at the FCC.

Furthermore, it increasingly appears that the FCC changed its proposed order under political influence, rather than independently. In the words of Commissioner Pai, "Why is the FCC changing course? President Obama told us to do so."

Finally, the public did not receive adequate notice of the final rule as required by the Administrative Procedure Act. Nearly every facet of the final rule is distinguishable from the proposed rule, and

many aspects of the final rule did not receive even a single mention in the proposed rule.

The Internet that existed before this FCC order was dynamic, competitive, open, and free. By raising costs, imposing a heavy regulatory burden, introducing regulatory uncertainty, and instituting government meddling into nearly every aspect of the Internet, the FCC will seriously undermine the competitive nature of the Internet. Barriers to entry will rise. Smaller rivals will be forced to exit. And consolidation will likely ensue.

Given these fundamental changes to the Internet, one would expect widespread documented abuses. Yet, within its 300-plus page order, the FCC does not point to a single example of actual anticompetitive conduct occurring on the Internet. Four million Americans wrote the FCC asking it to protect and promote an Open Internet. The FCC turned a deaf ear and delivered the most heavy-handed regulatory regime imaginable.

The FCC has destroyed the city in order to save it.

I look forward to hearing today's testimony on how the FCC's order will impact the future of competition on the Internet, and I now am pleased to yield to the Ranking Member of the Committee, the gentleman from Michigan, Mr. Conyers, for his opening statement.

Mr. CONYERS. Thank you, Mr. Chairman, for your views.

Now, the full Committee of Judiciary has a central role in studying the issue of net neutrality, and, more generally, competition on the Internet. As the Committee considers today the specific question of what impact the Federal Communication Commission's latest Open Internet order has on competition and innovation, we should keep several factors in mind.

To begin with, whatever approach one uses to ensuring an Open Internet inaction is not an option. There are real threats to net neutrality. And as I have observed earlier at hearings in 2008, 2011, 2014, there are many areas in the United States where consumers have the choice of only one or two broadband Internet service providers. As a result, these providers effectively function as monopolies or duopolies.

In turn, their control over the broadband access market can result in differential treatment of content, depending on how much a content provider pays, whether the broadband provider also offers competing content, or if any other financial incentive for discriminating for or against given content were present.

These concerns I have expressed before and have only become more problematic since then, particularly in light of further acquisition by broadband providers that may result in even less consumer choice, less innovation, higher costs, more power in the hands of these few broadband providers.

In light of this threat, I commend the Federal Communications Commission and its leadership for its work in crafting a strong set of rules for ensuring an Open Internet. Congress has created the FCC to develop the specialized expertise to properly regulate the complex telecommunications industry in the service of public interest.

After a lengthy rulemaking period, during which almost 4 million Americans and all industry stakeholders made their voices heard

on this issue, the FCC has fulfilled that mandate with respect to preserving and promoting an Open Internet. Rules to address net neutrality have the benefit of addressing potential threats to an Open Internet before they fully materialize.

Additionally, having a set of best practices enshrined in rules would provide certainty for industry. The FCC's net neutrality rules, therefore, must be given an opportunity to take root.

So I am pleased that the FCC's Open Internet order contains key provisions that I and others have long called for and that will help protect competition. They include a rule preventing broadband providers from blocking Internet access; from imposing paid prioritization of Internet traffic; also a restriction prohibiting any other practices that unreasonably interfere with or disadvantage users' ability to access broadband service or lawful content applications or services; and a requirement mandating disclosure to users of information concerning network management practices and any terms, conditions, or limitations on the broadband service itself.

These measures are critical to protecting the virtuous cycle of innovation, which net neutrality fosters, and which ensures both competition and innovation among broadband and content providers to the ultimate benefit of consumers.

Finally, enforcement of existing antitrust law as the exclusive or primary means of ensuring an Open Internet would be insufficient.

Under the current antitrust law, there is relatively little that regulators can do outside the merger review context to address the conduct of a regulated industry, such as broadband Internet service, with respect to enforcing net neutrality principles.

Through a series of decisions, the Supreme Court has limited the potential to successfully pursue claims under the Sherman Antitrust Act with respect to net neutrality. Moreover, exclusive reliance on antitrust enforcement is simply insufficient.

While having the benefit of a more nuanced and fact-specific approach to the problem, antitrust enforcement alone, I am sorry to say, would also be a cumbersome, more limited, more resource-intensive, and after-the-fact way to develop a regulatory regime for net neutrality.

Another potential approach would be for the Federal Trade Commission to use its authority under Section 5 of the Federal Trade Commission Act to stop unfair methods of competition. Although I hold an expansive view of Section 5, to the extent that this approach goes beyond the scope of the Sherman Act or other antitrust laws, it would be very controversial, as some of my friends here in the Committee would be the first to note.

So finally, moreover, antitrust law is not sufficiently broad in scope, as it fails to address the noneconomic goals of net neutrality, including the promotion of innovation, and the protection of free speech and political debate.

That is why the former Chairman of this Committee, a Republican, and Zoe Lofgren from California and I, all three of us introduced a bipartisan piece of legislation going back to 2006 to strengthen antitrust law to address net neutrality, in part because the FCC was doing too little at that time, in my view.

So I do not have that concern with the FCC's latest Open Internet order. Rather, I congratulate them on their good work. And I

welcome all of our witnesses, especially the chairman of FCC himself, to join in this discussion this afternoon.

And I thank you, Mr. Chairman, for the time.

Mr. GOODLATTE. Thank you, Mr. Conyers.

And without objection all other Members' opening statements will be made a part of the record.

We welcome our very distinguished panel today. And if you would all rise, I will begin by swearing in the witnesses.

Do you and each of you swear that the testimony that you are about to give shall be the truth, the whole truth, and nothing but the truth, so help you God?

Thank you very much.

Let the record reflect that all of the witnesses responded in the affirmative.

Tom Wheeler is the current chairman of the Federal Communications Commission. Prior to his appointment to the commission by President Obama, Chairman Wheeler was involved in telecommunications as a policy expert, advocate, and businessman. He has worked in senior positions at two technology investment companies, founded a technology company, and served as president and CEO at both the National Cable Television Association, and the Cellular Telecommunications and Internet Association. Chairman Wheeler earned his undergraduate degree from the Ohio State University.

Ajit Pai currently serves as an FCC Commissioner. Prior to his appointment to the commission by President Obama, Commissioner Pai held several positions within the FCC's Office of General Counsel, including as Deputy General Counsel.

Before joining the FCC, Commissioner Pai worked in both the public and private sectors. He was a communications law partner at the firm Jenner & Block, associate general counsel at Verizon, a trial attorney in the Antitrust Division of the Department of Justice, and chief counsel to a Senate Judiciary Subcommittee, and a clerk for Judge Feldman in the District Court of the Eastern District of Louisiana.

Commissioner Pai earned his undergraduate degree with honors from Harvard University, and his law degree from the University of Chicago, where he was an editor of the law review.

Joshua Wright currently serves as a commissioner to the Federal Trade Commission. Prior to his appointment to the commission by President Obama, Commissioner Wright was a professor at George Mason University School of Law and held a courtesy appointment in the Department of Economics. He is a leading scholar in antitrust law, economics, and consumer protection, and has published more than 60 articles and book chapters, coauthored a leading casebook, and edited several book volumes focusing on these issues.

Commissioner Wright is currently on his fourth stint at the FTC, having previously served in both the Bureau of Economics and Bureau of Competition.

Commissioner Wright earned his undergraduate degree with honors from the University of California, San Diego, and his law degree and Ph.D. from UCLA.

Terrell McSweeny currently serves as commissioner to the FTC. Prior to her appointment to the commission by President Obama,

Commissioner McSweeny served as chief counsel for the Competition Policy and Intergovernmental Relations Department within the Antitrust Division of the Department of Justice. Commissioner McSweeny previously served as senior adviser to President Obama and Vice President Biden, deputy chief of staff to then-Senator Biden, and counsel to the Senate Judiciary Committee. She also worked in private law practice at the firm O'Melveny & Myers.

Commissioner McSweeny earned her undergraduate degree from Harvard University, and her law degree from Georgetown University School of Law.

All of your written statements will be entered into the record in their entirety, and we ask that each of you summarize your testimony in 5 minutes or less. To help you stay within that time, there is a timing light on your table. When the light switches from green to yellow, you have 1 minute to conclude your testimony. When the light turns red, that is it, time is up. It signals that your 5 minutes have expired.

Chairman Wheeler, we are very appreciative of your being here today. You are welcome to begin the testimony. You may want to push the button on that and pull the microphone closer.

TESTIMONY OF THE HONORABLE TOM WHEELER, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION

Mr. WHEELER. As you said, Mr. Chairman, I did not go to law school, but I have built companies, met payrolls, and created jobs, and it is from that perspective that I would like to address the issues today.

The widespread use of the Internet exists because of decisions of the FCC decades ago that restrained the power of the dominant telecommunications network operator. To take one example that was important in my education as an entrepreneur, FCC regulations enabled open access for the modems that powered the early use of the Internet. There would have been no AOL without the FCC's openness mandate, for instance.

The whole Open Internet debate burst into the public consciousness when a Republican-led FCC took action against Comcast for degrading the delivery of content. The decision was overturned in court.

That led to the 2010 Open Internet rules. These, too, were challenged, and the court remanded them to the agency because the commission imposed common carrier-like requirements on activities previously characterized as information services.

Nonetheless, the court upheld the commission's power to protect the Open Internet and observed, "Broadband providers represent a threat to Internet openness."

This observation is not academic theory. It was my real-life experience as an entrepreneur. I was part of a new pay-per-view video service. When we would seek to get on a cable system, the first question the cable operator would ask is, what is our cut? Access had to be purchased.

Likewise, when I was a venture capitalist in the early days of mobile data, the only way a wireless carrier would let an application provider on his network was for a cut of the revenue. Again, access had to be purchased.

When internet protocol allowed consumers to leap these walled gardens, the ISPs sought to use their position as network gateways to their advantage.

Congressional leaders such as Representatives Walden and Upton, and Senator Thune, as the chairs of the FCC's authorizing Committees, introduced legislation banning blocking, throttling, and paid prioritization. Our order has a similar ban, as well as establishing that, in the future, ISPs cannot act to hurt consumers or innovators, a determination the FCC would make on a case-by-case basis, not by broad prescriptive regulations.

We took a businesslike approach in our report and order. It was patterned on the regulation the wireless industry asked for in 1993, and which has proven so successful, Title II status and the forbearance from the old parts of Title II that don't apply to the new circumstances. And it is an approach that worked.

When, for instance, the big wireless carriers refused to let voice customers of smaller carriers roam on their networks, it was a Republican-led FCC that in 2007 invoked Title II to mandate open access.

Finally, allow me to quickly reflect on the allegation that our order creates business-threatening uncertainty. When Title II was applied to broadband DSL in the late 1990's and early 2000's, it didn't chill investment. The network industry invested more than it had before or since.

Similarly, during the 4 years the 2010 Open Internet rules were in place, broadband capital investment increased steadily, topping out at almost $70 billion annually. It is no wonder, therefore, that Sprint, T-Mobile, Frontier Communications, Google Fiber, Cable Vision, along with hundreds of small rural phone companies and the small competitive wireless companies, all say they can build their business within Title II.

Even behemoths like Comcast, AT&T, and Verizon, who opposed what we did, continued to invest in their networks even knowing the rule was coming. In fact, AT&T and Verizon did so very dramatically in the recent AWS-3 spectrum auction.

There would be, however, a serious casualty of uncertainty were no Open Internet rules in place, the innovators who need to know that they will be able to get on the networks owned by Comcast and AT&T and Verizon.

Openness without fear of pay-to-play is the key to innovation. Similarly, if investors believe their capital will be siphoned off by the big network providers or, worse, the companies won't be able to reach consumers, investment capital will dry up.

I recognize the propensity of this issue to dance on the heads of legal pins. In reality, however, this issue is simply about whether those who operate networks will be the rule-makers or whether consumers and innovators will have the security of knowing that the network operators will not be able to misuse their position.

Thank you again for this opportunity. I look forward to your questions.

[The prepared statement of Mr. Wheeler follows:]

Statement of
Chairman Tom Wheeler
Federal Communications Commission

Hearing on
"Wrecking the Internet to Save It? The FCC's Open Internet Rule"
Before the
Committee on the Judiciary
U.S. House of Representatives

March 25, 2015

Chairman Goodlatte, Ranking Member Conyers, and distinguished members of the Committee, I appreciate the opportunity to discuss the FCC's Open Internet Order from the perspective of a business person. I did not go to law school, but I have built companies, met payrolls, and created jobs. It is from that perspective that I'd like to address the issues today.

Widespread use of the Internet exists because of decisions of the FCC decades ago that restrained the power of the dominant telecommunications network operator. To take one example that was important in my education as an entrepreneur, FCC regulations enabled open access for the modems that powered the early use of the Internet. There would have been no AOL without the FCC's openness mandate.

The whole Open Internet debate burst into the public consciousness when a Republican-led FCC took action against Comcast for degrading the delivery of content. That decision was disallowed by the court.

That led to the 2010 Open Internet rules. These, too, were challenged and the court remanded them to the agency because the Commission imposed common carrier-like requirements on activities previously characterized as "information services." Nonetheless, the court upheld the Commission's power to protect the Open Internet and observed: "Broadband providers represent a threat to Internet openness."

This observation is not academic theory. It was my real-life experience as an entrepreneur.

I was part of a new pay-per-view video service. When we'd seek to get on a cable system the first question the cable operator would ask was "what's our cut?" Access had to be purchased. Likewise, when I was a venture capitalist in the early days of mobile data, the only way a wireless carrier would let an application provider on its network was for a cut of the revenue. Again, access had to be purchased. When Internet Protocol allowed consumers to leap these walled gardens, the ISPs sought to use their position as network gateways to their advantage.

Congressional leaders such as Representatives Walden and Upton and Senator Thune, as the chairs of the FCC's authorizing committees, introduced legislation banning blocking, throttling and paid prioritization. Our Order has a similar ban, as well as establishing that in the future ISPs cannot act to hurt consumers or innovators; a determination the FCC would make on a case-by-case basis, not by broad prescriptive regulations.

We took a business-like approach in our Report and Order. It was patterned on the regulation the wireless industry asked for in 1993 and which has proven so successful: Title II status and forbearance from old parts of Title II that don't apply to the new circumstances. And it is an approach that worked. When, for instance, the big wireless carriers refused to let the voice customers of smaller carriers roam on to their networks, it was a Republican-led FCC that in 2007 invoked Title II to mandate open access.

Finally, allow me to quickly reflect on the allegation that our Order creates business-threatening uncertainty. When Title II was applied to broadband DSL in the late '90s and early 2000's, it didn't chill investment: the network industry invested more than it had before or since. Similarly, during the four years the 2010 Open Internet rules were in place, broadband capital investment increased steadily, topping out at almost $70 billion annually.[1]

No wonder Sprint,[2] T-Mobile,[3] Frontier Communications,[4] Google Fiber,[5] Cablevision,[6] along with hundreds of small rural phone companies,[7] and the small competitive wireless companies[8] all say they can build their businesses within Title II. Even behemoths like Comcast, AT&T and Verizon who oppose what we did continued to invest in their networks even knowing the rule was coming. In fact, AT&T and Verizon did so very dramatically in the AWS-3 auction.

There would be, however, a serious casualty of uncertainty were no Open Internet rules in place: the innovators who need to know they will be able to get on the networks owned by Comcast, AT&T and Verizon. Openness without fear of pay-to-play is the key to innovation. Similarly, if investors believe their capital will be siphoned off by the big network providers, or worse, their companies won't be able to reach consumers, investment capital will dry up.

I recognize the propensity to dance on the head of legal pins on this issue. In reality, however, this issue is simply about whether those who operate networks will be the rule-makers, or whether consumers and innovators will have the security of knowing that the network operators will not be able to misuse their positions.

Thank you again for this opportunity to testify. I welcome your questions.

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[1] *See* USTelecom, *Historical Broadband Provider Capex*, http://www.ustelecom.org/broadband-industry-stats/investment/historical-broadband-provider-capex.

[2] Letter from Stephen Brye, Chief Technology Officer, Sprint to Marlene H. Dortch, FCC at 1 (filed Jan. 15, 2015) ("Sprint does not believe that a light touch application of Title II, including appropriate forbearance would harm the continued investment in, and deployment of, mobile broadband services.").

[3] Thomas Gryta, *T-Mobile Joins Sprint in Downplaying FCC's Broadband Reclassification*, Wall Street Journal (Feb. 19, 2105) (quoting T-Mobile COO Mike Sievert, "There is nothing in there that gives us deep concern about our ability to continue executing our strategy."), http://blogs.wsj.com/corporate-intelligence/2015/02/19/t-mobile-joins-sprint-in-downplaying-fccs-broadband-reclassification/.

[4] Sean Buckley, *Frontier's Wilderotter is Comfortable with Title II Reclassification*, FierceTelecom (Feb. 9, 2015) (Title II "does not affect our basic business"), http://www.fiercetelecom.com/story/frontiers-wilderotter-comfortable-title-ii-reclassification/2015-02-09.

[5] Brian Fung, *Google: Strong Net Neutrality Rules Won't Hurt the Future Rollout of Google Fiber*, Washington Post (Jan. 27, 2015) (quoting Google spokesman "The sort of open Internet rules that the [FCC] is currently discussing aren't an impediment to those plans . . . and they didn't impact our decision to invest in Fiber."), http://www.washingtonpost.com/blogs/the-switch/wp/2015/01/27/google-strong-net-neutrality-rules-wont-hurt-the-future-rollout-of-google-fiber/.

[6] Shalini Ramachandran & Michael Calia, *Cablevision CEO Plays Down Business Effect of FCC Proposal*, Wall Street Journal (Feb. 25, 2015) (quoting Cablevision CEO James Dolan, "we don't see at least what the Chairman has been discussing as having any real effect on our business"), http://www.wsj.com/articles/cablevision-net-neutrality-fcc-proposal-earnings-subscribers-1424872198.

[7] Shirley Bloomfield, CEO, NTCA—The Rural Broadband Association, *Net Neutrality: Looking Back and Getting Ready for Many Months Ahead* (Feb. 25, 2015) ("So, as the track records of RLECs make clear, Title II can provide a useful framework and does not need to be an impediment to investment in and ongoing operation of broadband networks"), http://www.ntca.org/2015-press-releases/net-neutrality-looking-back-and-getting-ready-for-many-months-ahead.html.

[8] Steven Berry, CEO, CCA, *Statement on Net Neutrality* (Feb. 26, 2015) ("CCA supports an open Internet for competitive carriers and consumers alike. As long as the FCC [allows network management flexibility and preserves universal service mechanisms], CCA will not object."), http://competitivecarriers.org/press/rca-press-releases/cca-statement-on-net-neutrality/9117115.

Mr. GOODLATTE. Thank you, Chairman Wheeler.
Commissioner Pai, welcome.

TESTIMONY OF THE HONORABLE AJIT PAI, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Mr. PAI. Thank you, Mr. Chairman. Chairman Goodlatte, Ranking Member Conyers, Members of the Committee, thank you for inviting me to testify today. I appreciate the opportunity to share with you my views on one of the most important regulatory decisions in recent history, the FCC's decision to regulate the Internet.

Put simply, Title II Internet regulation is a solution that won't work to a problem that doesn't exist.

First, the Internet isn't broken. There was nothing for the FCC to fix. Indeed, the Internet ecosystem in the United States is the envy of the world. Nonetheless, the FCC decided to treat broadband as a public utility. In so doing, it erased a bipartisan consensus dating back to the Clinton administration that the Internet should be unfettered from government regulation.

Second, the FCC's Title II solution isn't narrowly tailored to solve even the hypothetical net neutrality problem. It goes far beyond that by adopting a broad and general Internet conduct standard rule, by threatening Internet service providers with rate regulation, by claiming authority to regulate Internet interconnection, and by applying a variety of Title II provisions that have nothing to do with net neutrality.

All of this regulation will be a raw deal for consumers. It will mean higher broadband prices, lower broadband speeds, fewer service plan choices, and less competition in the broadband marketplace.

Now let me focus on that last point, since antitrust teaches that robust competition is the best way to protect consumer welfare. Title II will reduce competition among Internet service providers. Monopoly rules designed in the monopoly era will inevitably move us in the direction of a monopoly. Thousands of smaller ISPs don't have the means to withstand a regulatory onslaught.

This isn't just my view. The President's own Small Business Administration admonished the FCC that its proposed rules would unduly burden small businesses.

Unsurprisingly, small ISPs are worried. One-hundred-forty-two wireless ISPs said the FCC's new rules "would likely force us to raise prices, delay deployment expansion, or both." Twenty-four of the country's smallest ISPs, each with fewer than 1,000 customers, told us that Title II "will badly strain our limited resources." And 43 government-owned broadband providers told the FCC that Title II will "risk serious harm to our ability to fund and deploy broadband without bringing any concrete benefit for consumers or edge providers." These are joined by many other companies, big and small.

In sum, the FCC's Title II regulations not only address a nonexistent problem in the marketplace, they will actually harm consumers by limiting their broadband choices.

Even if there were evidence of anticompetitive behavior, antitrust would provide the appropriate framework for addressing this

problem. The scalpel of antitrust, not the sledgehammer of Title II, is the best guarantor of consumer welfare.

The Department of Justice and the Federal Trade Commission are quite capable of vindicating the public interest by investigating and, as appropriate, prosecuting business practices that threaten competition. These authorities are likely to be more effective than applying Title II.

For one thing, the FCC's order goes far beyond bright-line rules. It adopts vaguely worded standards that are sure to mire the FCC and the industry in novel, free-ranging, and expansive proceedings.

For another thing, antitrust law focuses on the abuse of market power, but the FCC's Title II regulations presume that each and every Internet service provider is, per se, an anticompetitive gatekeeper. This view has no basis in economics or the agency's record. The notion that corporate behemoths like Facebook, Google, and Netflix need to be protected from Main Street Broadband, an ISP with four customers in Cannon Falls, Minnesota, is absurd.

Finally, antitrust allows the DOJ and the FTC to target the actual exercise of market power by dominant providers whenever it presents a threat to online competition. In contrast, the FCC's Title II approach focuses solely on the conduct of ISPs, ignoring evidence suggesting that startups face a greater and existing threat from a different corner, dominant edge providers.

Twitter's recent blocking of Meerkat, detailed in my written testimony, is just one example.

For these and other reasons, I believe that the FCC's heavy-handed Internet regulations will reduce competition and harm consumers. Antitrust enforcement would be a far superior approach.

Chairman Goodlatte, Ranking Member Conyers, Members of the Committee, thank you once again for allowing me to testify. I look forward to answering your questions and to working with you and your staff in the time to come.

[The prepared statement of Mr. Pai follows:]

STATEMENT OF AJIT PAI
COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION
BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

"WRECKING THE INTERNET TO SAVE IT?
THE FCC'S NET NEUTRALITY RULE"

MARCH 25, 2015

Chairman Goodlatte, Ranking Member Conyers, and Members of the Committee, thank you for inviting me to testify today. I appreciate the opportunity to share with you my views on one of the most important regulatory decisions in recent history: the Federal Communications Commission's decision to regulate the Internet.

As background, I began my career as an antitrust lawyer. Between 1998 and 2001, I served as an Honors Program attorney in the U.S. Department of Justice's Antitrust Division, working in the then-Telecommunications Task Force. Later, while working in the private sector between 2001 and 2003, I had the opportunity to handle a variety of antitrust matters.

1. Title II is a Solution That Won't Work for a Problem That Doesn't Exist

Let me start by offering what should be a universally shared proposition: A federal agency should adopt industry-wide regulations only when (1) there is evidence of an existing industry-wide problem, such as market failure or rampant anticompetitive behavior, and (2) the regulatory solution is narrowly tailored to solve that problem. In this case, however, the FCC failed both tests. Put simply, Title II Internet regulation is a heavy-handed solution that won't work for a problem that doesn't exist.

First, I'll address the lack of an industry-wide problem. The FCC's *Order* itself confirms a basic truth: The Internet isn't broken. There was nothing for the FCC to fix. Indeed, the Internet ecosystem in the United States is the envy of the world.

It is striking how thin the factual foundation for the *Order* is. A small ISP in North Carolina allegedly blocked VoIP calls a decade ago. Comcast capped BitTorrent traffic to ease upload congestion eight years ago. Apple introduced FaceTime over Wi-Fi first, cellular networks later. Examples this picayune and stale are hardly enough to justify regulating the entire broadband industry in 2015. A federal court complaint this weak would not survive a motion to dismiss.

In lieu of facts, the *Order* parades a number of hypothetical horribles. "[B]roadband providers have both the incentive and the ability to act as gatekeepers." They have "the potential to cause a variety of other negative externalities that hurt the open nature of the Internet." They have "the incentive and ability to engage in paid prioritization" or other "consumer harms." The common thread linking these and countless other examples is that they simply *do not exist*. They're theorized harms that haven't materialized in this increasingly competitive environment.

Nonetheless, the FCC reclassified Internet service providers as common carriers and broadband Internet access as a telecommunications service. In so doing, it erased a bipartisan consensus dating back to the Clinton Administration that the Internet should be unfettered from government regulation. And it adopted conduct-based Internet regulations (broadband providers can't block Internet traffic, throttle traffic, or engage in "paid prioritization" of traffic) that are chasing phantoms. Internet service providers do not block lawful content of consumers' choosing. They don't throttle applications. They don't offer paid prioritization or "fast lanes."

Second, the FCC's Title II solution isn't narrowly tailored to solve even the hypothetical net neutrality problem. If the FCC were solely interested in preventing ISPs from ever blocking, throttling, or

engaging in paid prioritization, then the agency would have had no need to adopt the expansive regulations it did.[1] It would have been unnecessary, for example, for the FCC to adopt a broad and general "Internet conduct" rule, threaten Internet service providers with rate regulation, claim authority to regulate Internet interconnection, and apply a variety of Title II provisions that have nothing to do with net neutrality now or in the all-too-soon future.

The result of this pervasive regulation? Higher broadband prices, lower broadband speeds, fewer service plan choices, and less competition in the broadband marketplace. That's a raw deal for consumers.

Let me focus on that last point, since antitrust teaches that robust competition is the best way to protect consumer welfare: Title II will reduce competition among Internet service providers.[2]

Reclassifying broadband, applying the core of Title II rules, and half-heartedly forbearing from applying the rest "for now" or "at this time" (as the *Order* suggests) will drive smaller competitors out of business and leave the rest in regulatory vassalage. Monopoly rules designed for the monopoly era will inevitably move us in the direction of a monopoly. In that regard, this plan is little more than a Kingsbury Commitment for the digital age.[3]

Today there are thousands of smaller Internet service providers—wireless Internet service providers (WISPs), small-town cable operators, municipal broadband providers, electric cooperatives, and others—that don't have the means or the margins to withstand a regulatory onslaught. Imposing on competitive broadband companies the rules designed to constrain the continent-spanning Bell telephone monopoly will do nothing but raise the costs of doing business. Smaller, rural competitors will be disproportionately affected, and the FCC's decision will diminish competition—the best guarantor of consumer welfare.

This isn't just my view. The President's own Small Business Administration admonished the FCC that its proposed rules would unduly burden small businesses. The SBA urged the FCC to "address[] the concerns raised by small businesses in comments" and "exercise appropriate caution in tailoring its final rules to mitigate any anti-competitive pressure on small broadband providers as well."[4] The FCC ignores this admonition by applying heavy-handed Title II regulations to each and every small

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[1] *See* Julian Hattem and Mario Trujillo, "OVERNIGHT TECH: FCC aims to close auction loophole," *The Hill* (Mar. 18, 2015) (quoting Eric Schmidt, Executive Chairman of Google, Inc. as saying "As a general rule, less regulation is better. . . . So the problem with where we are now is trying to figure out where the harms are and we have benefited from essential government staying out of the Internet and I'm worried that we're now on a path starting to regulate an awful lot of things on the Internet."), *available at* http://thehill.com/policy/technology/overnights/236202-overnight-tech-fcc-plans-to-combat-auction-loophole.

[2] This is just one of the ways in which consumers will be harmed by the application of Title II to the Internet. I detail the other negative effects—higher broadband prices, lower broadband speeds, fewer service plan choices, and more—in my dissent from the *Order*. *See* Dissent at 5–10 (Feb. 26, 2015), *available at* http://bit.ly/1xVeDDs.

[3] The Kingsbury Commitment was the 1913 agreement between the Justice Department and AT&T that essentially allowed the company to monopolize the telephone market under the mantra "one policy, one system, and universal service." With the market subject to onerous common carrier regulations, independent competitors—and with them competition—became extinct. *See* Remarks of FCC Commissioner Ajit Pai at TechFreedom's Forum on the 100th Anniversary of the Kingsbury Commitment (Dec. 19, 2013), *available at* http://go.usa.gov/3cKdk.

[4] Small Business Administration Office of Advocacy, Fact Sheet: Advocacy Submits Comments to the Federal Communications Commission regarding Small Business Engagement and Regulatory Flexibility Act Compliance, http://go.usa.gov/3cKdP (Sept. 25, 2014); Letter from Winslow L. Sargeant, Ph.D., Chief Counsel, Office of Advocacy, U.S. Small Business Administration, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 13-5, 12-353, WC Docket Nos. 05-25, 10-90, RM-10593 (Sept. 25, 2014), *available at* http://go.usa.gov/3cKsm.

broadband provider as if it were an industrial giant. As a result, small providers will be squeezed—perhaps out of business altogether. If they go dark, consumers they serve will be thrown offline.

Unsurprisingly, small Internet service providers are worried. I heard this for myself at the Texas Forum on Internet Regulation, which I convened in October 2014. One of the panelists, Joe Portman, runs Alamo Broadband, a WISP that serves 700 people across 500 square miles south of San Antonio. As he put it, his customers "had very limited choices for internet service before we came along. The big names, the telcos and cable companies, when it comes to rural areas such as the areas we serve don't see the value and won't invest the capital (at least if it's their money) to build infrastructure and bring service to the people that live there. We, and thousands others like us, have found a way to do it."[5]

Mr. Portman thinks Title II is "pretty much a terrible idea." His staff "is pretty busy just dealing with the loads we already carry. More staff to cover regulations means less funds to run the network and provide the very service our customers depend on." In his view, Title II will just impede broadband deployment.

Numerous WISPs told the FCC they agreed with him. These WISPs have deployed wireless broadband to customers who often have no alternatives. They rely heavily on unlicensed spectrum, take no federal subsidies, and often run on a shoestring budget with just a few people to run the business, install equipment, and handle service calls. They have no incentive and no ability to take on commercial giants like Netflix. And they say the FCC's new "regulatory intrusion into our businesses . . . would likely force us to raise prices, delay deployment expansion, or both."[6]

The FCC also heard from dozens of the country's smallest Internet service providers, each with fewer than 1,000 residential broadband customers. The largest, FamilyView Cablevision, has just 900 customers in Pendleton, South Carolina. The smallest, Main Street Broadband, has just four—four!—residential customers in Cannon Falls, Minnesota. These companies told us that Title II "will badly strain our limited resources" because these Internet service providers "have no in-house attorneys and no budget line items for outside counsel" and the "rules of the road . . . could change anytime the issues an advisory, rules on a complaint, or adopts new rules. To subject small and medium-sized ISPs to such a regime, no less the very smallest of ISPs, is simply unreasonable."[7]

Even government-owned broadband projects think Title II is a tremendous mistake. Forty three of them flatly told the FCC that "there is no basis for the Commission to reclassify our Internet service for the purpose of imposing any Title II common carrier obligations."[8] They continued, "Title II regulation will undermine the business model that supports our network, raises our costs and hinders our ability to further deploy broadband." Their closing was a stinging rebuke to those who argue that Title II is harmless to those providers who don't harm consumers:

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[5] Testimony of Joe Portman, President and Founder, Alamo Broadband Inc., Elmendorf, Texas, at the Texas Forum on Internet Regulation, at 1 (Oct. 21, 2014), *available at* http://go.usa.gov/3cpPc.

[6] Letter from Dustin Surran, Aerux.com, Castle Rock, Colorado, Bryan Robinson, Affordable Internet Solutions, Waverly, Nebraska, and 140 other WISPs to the Honorable Thomas Wheeler, Chairman, FCC, GN Docket No. 14-28 (Feb. 19, 2015), *available at* http://go.usa.gov/3c8rH.

[7] Letter from Robert J. Dunker, Owner/President, Atwood Cable Systems, Inc., Atwood, Kansas, Richard A. Nowak, Owner/President, Bellaire TV Cable Company, Bellaire, Ohio, and 22 other small ISPs to the Honorable Thomas Wheeler, Chairman, FCC, GN Docket Nos. 14-28, 10-127 (Feb. 17, 2015), *available at* http://go.usa.gov/3cpPw.

[8] Letter from Randy Darwin Tilk, Utility Manager, Alta Municipal Broadband Communications, Alta, Iowa, Loras Herrig, City Administrator, Bellevue Municipal Cable, Bellevue, Iowa, and 41 other municipal ISPs to the Honorable Thomas Wheeler, Chairman, FCC, GN Docket Nos. 14-28, 10-127, at 1 (Feb. 10, 2015), *available at* http://bit.ly/1Mmw89f.

> [W]e ask that you not fall prey to the facile argument that if smaller ISPs are not blocking, throttling, or discriminating amongst Internet traffic on their networks today, they have nothing to fear because they will experience no harm under Title II regulation. The economic harm will flow not from following net neutrality principles, which we do today because we think it is beneficial to all, but from the collateral effects of a change in regulatory status that will trigger consequences beyond the Commission's control and risk serious harm to our ability to fund and deploy broadband without bringing any concrete benefit for consumers or edge providers that the market is not already proving today without the aid of any additional regulation.

It's for these reasons that the Small Business & Entrepreneurship Council, a nonprofit organization representing nearly 100,000 small businesses nationwide, wrote to us that Title II "will deeply erode investment and innovation, which will dramatically harm entrepreneurs and small businesses."[9] Similarly, the National Black Chamber of Commerce, the National Gay & Lesbian Chamber of Commerce, the U.S. Hispanic Chamber of Commerce, and the U.S. Pan Asian American Chamber of Commerce told us that "Forcing the Internet into a Title II classification can only make it more difficult for individuals to make the highest and best use of this important tool . . . . The last thing small businesses in America need are more forms to fill out; more regulations to track; and more rules to follow."[10]

In sum, the FCC's Title II regulations not only address a non-existent problem in the marketplace. They'll actually harm consumers by limiting their broadband choices. As Justice Breyer has written, "Regulation is viewed as a substitute for competition, to be used only as a weapon of last resort—as a heroic cure reserved for a serious disease."[11] There was no indication of disease here, and even if there were, Title II is no cure.

2. The Best Guarantor of Consumer Welfare Online is Antitrust

Even if there were evidence of anticompetitive behavior in the broadband marketplace, antitrust laws would provide the appropriate framework for addressing the problem. The scalpel of antitrust, not the sledgehammer of Title II common-carrier regulation, is the best guarantor of consumer welfare online.

The U.S. Department of Justice's Antitrust Division and the Federal Trade Commission are quite capable of vindicating the public interest by investigating and, as appropriate, prosecuting business practices that threaten competition. Under the "rule of reason," the Department or FTC could pursue every (hypothetical) broadband Internet access provider practice targeted in the FCC's *Order*. For instance, if an Internet service provider entered into a contractual arrangement with a content provider to allow prioritized delivery of the content provider's Internet traffic to the ISP's customers, the government could evaluate the arrangement under well-established principles on exclusionary vertical agreements. This would be better for consumers than the FCC's flat ban, which I believe is both unlawful (because common carriage regulation has permitted different pricing for different services since the 1800s) and unwise (because the economic literature makes clear that some exclusive vertical deals can promote consumer welfare, a nuance the FCC's rules reject out of hand).

Similarly, the Federal Trade Commission has authority under Section 5 of the Federal Trade Commission Act to prohibit "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."[12] As FTC Commissioner Maureen Ohlhausen has

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[9] Small Business & Entrepreneurship Council Comments at 2.

[10] National Black Chamber of Commerce et al. Comments at 2.

[11] Stephen G. Breyer, "Antitrust, Deregulation, and the Newly Liberated Marketplace," 75 Cal. L. Rev. 1005, 1007 (1987).

[12] 15 U.S.C. § 45.

explained, Section 5 "allows the FTC the prosecutorial flexibility to try to achieve the greatest social welfare possible" and allows a "flexible, normative, and rigorously fact-based approach to enforcement [that] is a perfect fit for overseeing the dynamic businesses tied to the Internet."[13] Particularly to the extent that the FTC endorses Commissioner Joshua Wright's call to issue guidelines on Section 5[14]—for instance, by defining an "unfair method of competition" to incorporate rule-of-reason principles—the private sector would have much greater certainty and freedom to innovate than they would under the FCC's approach. Antitrust's rule of reason, after all, has been developed by the courts over the course of a century, whereas the FCC's ahistorical Internet conduct standard is so broad and vague that no one knows how it will be applied, leaving room for abuse by favored parties with insider influence.

Additionally, the application of Title II to Internet service providers is likely to be less effective than antitrust enforcement. *For one thing*, the meat of the *Order* isn't the bright-line rules (which prohibit practices no one uses) but instead labor-intensive, after-the-fact judgments based on individual complaints. Whereas antitrust authorities can evaluate the competitive effects of a particular company's practice with dispatch given extensive experience, the FCC's new standard has no precedent, and inquiries are likely to be free-ranging and expansive. Whereas antitrust complaints are few because good actors know the safe harbors and there are tell-tale signs of wrongdoing, complaints may abound at the FCC since no one knows what is permissible and what is prohibited. And whereas the antitrust focuses on failures in a generally competitive market, the FCC has declared competition a failure from the outset, so the Commission will need to evaluate *de novo* whether the rates are just and reasonable for each of our nation's 4,462 ISPs.

For another thing, antitrust allows a focus on the abuse of market power, appropriately targeting only actors that could have both the incentive and the ability to behave in an anticompetitive manner. By contrast, the FCC's Title II regulations presume that each and every Internet service provider is *per se* an anticompetitive gatekeeper against edge providers that must be restrained through heavy-handed, *ex ante* rules. This view of the marketplace has no basis in economics or the agency's record. The notion that corporate behemoths like Netflix, Facebook, and Google need to be protected from Main Street Broadband, with its four customers in Cannon Falls, Minnesota, is absurd.

Further, and on a related note, the *Order* targets only one corner of the Internet economy—ISPs—on the theory that at some time in the future, such providers may impede innovation among nascent edge providers. Yet the online economy is an ecosystem, and evidence suggests that startups face a greater, and *existing*, threat from a different corner: dominant edge providers.[15] Antitrust authorities

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[13] "Net Neutrality vs. Net Reality: Why an Evidence-Based Approach to Enforcement, And Not More Regulation, Could Protect Innovation on the Web," *Engage*, 82, 83 (Feb. 2013), *available at* http://1.usa.gov/1BnzwaP.

[14] "Section 5 Revisited: Time for the FTC to Define the Scope of Its Unfair Methods of Competition Authority" (Feb. 26, 2015), *available at* http://1.usa.gov/1BIw4rg.

[15] For instance, two weeks ago, on only two hours' notice, Twitter blocked a startup called Meerkat—which allows users to livestream video from a smartphone—from accessing Twitter's "social graph," which enabled Meerkat users to import their contacts from Twitter. *See* "Twitter Chokes Off Meerkat's Access To Its Social Network," BuzzFeed News (Mar. 13, 2015), *available at* http://bzfd.it/1CRe9FZ. Coincidentally, just days before, Twitter purchased a company that was a direct competitor to Meerkat. Many believe that Twitter's decision will harm Meerkat's ability to compete. *See, e.g.*, "Twitter cuts Meerkat off from its social graph just as SXSW gets started," The Verge (Mar. 13, 2015) ("[S]ome of the things that have made Meerkat compelling could degrade significantly"), *available at* http://bit.ly/1FluCkL; Business Insider (Mar. 18, 2015) ("There's no doubt that Twitter's limitations have crippled Meerkat for now."), *available at* http://read.bi/1GLyNVu. But because the FCC's Internet regulations do not extend to edge providers, it would have no power to evaluate concerns in the app developer community about possible anticompetitive conduct. *See* "Twitter's Meerkat crackdown reignites concerns among developers," Mashable (Mar. 16, 2015), *available at* http://on.mash.to/1BuyUzV; *cf.* "Why Twitter faves #NetNeutrality," Twitter Blog, *available at* https://blog.twitter.com/2015/net-neutrality ("We strongly support

have a mandate to view the entire marketplace and target any bad actor, a far better outcome for consumers than a myopic focus on ISPs.

Finally, the entire FCC *Order* itself is certain to be challenged in court, miring the agency in litigation for a long, long time. Judging from recent experience—the FCC's 2008 Comcast-BitTorrent decision was voided in 2010, and its 2010 "Open Internet" rules were vacated in 2014—and the likelihood of Supreme Court review, the fate of the FCC's third attempt at Internet regulation may not be resolved until the end of this decade.

For all of these reasons, I believe that the FCC's heavy-handed Internet regulations will harm consumers. Increased competition and antitrust enforcement would be a far superior option for protecting consumer welfare.

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Chairman Goodlatte, Ranking Member Conyers, and Members of the Committee, thank you once again for inviting me to testify at this hearing. I look forward to your questions.

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ensuring that such [FCC net neutrality] rules include prohibitions against blocking or throttling of sites and services.").

Mr. GOODLATTE. Thank you, Commissioner Pai.
Commissioner Wright, welcome.

TESTIMONY OF THE HONORABLE JOSHUA D. WRIGHT, COMMISSIONER, FEDERAL TRADE COMMISSION

Mr. WRIGHT. Thank you, Chairman. Chairman Goodlatte, Ranking Member Conyers, Members of the Committee, thank you very much for the opportunity to appear before you today. My name is Josh Wright, and I am a commissioner at the Federal Trade Commission.

Before diving into the FCC's latest net neutrality regulation, I want to make clear that the views I express today are my own and do not necessarily reflect the views of the FTC or any other commissioner. My views are based upon my experience and expertise as an academic economist, antitrust lawyer, and law professor researching antitrust and regulation, and as a commissioner of the FTC.

I want to begin by discussing net neutrality from an economic perspective. The first relevant question to address in my view is what market failure, if any, is the FCC trying to solve with net neutrality regulation. Chairman Wheeler has expressed concern that broadband providers are gatekeepers. There are gatekeepers everywhere. Not all gatekeepers require regulation.

Starbucks is the gatekeeper to my all-important morning cup of coffee, and the supermarket is the gatekeeper to your access to Cheerios. A gatekeeper becomes an economic problem potentially worthy of regulation only insofar as the broadband industry is either a natural monopoly or otherwise exhibits meaningful monopoly power. The simple fact that there are multiple suppliers of both wired and wireless broadband Internet render this justification of regulation unpersuasive.

Nevertheless, fearing that any network discrimination by broadband providers creates undue risks of competitive harm, net neutrality proponents have argued for a one-size-fits-all prohibition. This categorical prohibition ignores the empirical economic research that demonstrates plainly that contractual arrangements between entities that occupy different links in the same supply chain—in this case, Internet access providers and content providers—very rarely result in consumer harm.

Further, economists have long understood that these vertical restraints often and, indeed, overwhelmingly provide substantial benefits for consumers. As one study from leading economists assessing the state of empirical evidence on vertical contracts at issue here says, "With few exceptions, the literature does not support the view that these practices are used for anticompetitive reasons."

Other surveys of the economic literature by prominent economists come to similar conclusions. So does the FTC's investigation of the broadband industry.

In my view, it is more than fair to say there is a general consensus upon empirical economists on this point.

Surely, given the state of the economics literature and the FTC's own report, the FCC's categorical prohibition is inappropriate and likely to harm consumers.

Now if the best economic evidence cannot possibly justify an outright ban on vertical restraints in the broadband industry, yet there is some chance that vertical restraints can harm some broadband consumers some of the time, then what should a regulatory agency like the FCC do? My answer is nothing, and the reason is that antitrust law is exceptionally well-equipped to pick up the slack.

Indeed, President Obama's current regulatory czar and former director of the FTC's own Bureau of Economics, Howard Shelanski, has noted that antitrust enforcement is often superior to broad regulation. This is because antitrust jurisprudence has evolved a highly sophisticated rule of reason to adjudicate various types of vertical arrangements by analyzing their cost and benefits to consumers on a case-by-case basis.

Indeed, antitrust law initially adopted but ultimately and long ago rejected a categorical prohibition of certain vertical restraints, not unlike the FCC's new prohibition on paid prioritization. The FCC should learn from antitrust's historical mistakes rather than relive them.

I am quite confident that the antitrust regime, after more than a century of developing expertise and applying it to rule of reason, will be able to apply it to the broadband industry.

I will now turn from antitrust to the FTC's other enforcement priority, consumer protection. By reclassifying broadband Internet providers as common carries under Title II, the FCC threatens to strip the FTC of its jurisdiction to regulate broadband providers. I believe reclassification under Title II will unequivocally harm consumers by depriving them of the FTC's activities in the broadband sector.

Importantly, the FTC has certain enforcement tools at its disposal that are not available to the FCC. Unlike the FCC, for example, the FTC can bring cases in Federal district court and obtain equitable remedies, such as consumer redress.

The FTC's recent action against AT&T in Federal district court involving failure to disclose throttling to consumers on unlimited data plans and its settlement with TracFone, who agreed to pay $40 million to the FTC for consumer redress to settle charges that it deceived millions of consumers with its promise of unlimited data service, are just two examples illustrating the consumer benefits that will disappear with reclassification.

In my view and for the reasons discussed, I am confident that a complete and economically rigorous cost-benefit analysis of the FCC's new regulation would reveal that it will harm competition and leave consumers worse off than a regime focused upon antitrust.

Thank you for your time and for the invitation to testify. I am happy to answer any questions.

[The prepared statement of Mr. Wright follows:]

Federal Trade Commission

PREPARED STATEMENT OF

COMMISSIONER JOSHUA D. WRIGHT
FEDERAL TRADE COMMISSION

ON

WRECKING THE INTERNET TO SAVE IT?
THE FCC'S NET NEUTRALITY RULE

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

WASHINGTON, D.C.
MARCH 25, 2015

I. INTRODUCTION

Chairman Goodlatte, Ranking Member Conyers, and Members of the Committee, thank you for the opportunity to appear before you today. My name is Joshua Wright and I am a Commissioner at the Federal Trade Commission. I am pleased to join you to discuss the Federal Communications Commission's newest regulation of the broadband sector. Before diving into the issues, I want to make clear that the views I express today are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

Today I will discuss my belief that the FCC's newest regulation does not make sense from an economic perspective. By this I mean that mean that the FCC's decision to regulate broadband providers as common carriers under Title II of the Communications Act of 1934 will make consumers of broadband internet service worse off, rather than better off. Central to my conclusion that the FCC's attempts to regulate so-called "net neutrality" in the broadband industry will ultimately do more harm than good for consumers is that the FCC and commentators have failed to identify a problem worthy of regulation, much less cumbersome public-utility-style regulation under Title II.[1]

[1] In addition, the FCC's decision to regulate broadband providers under Title II is likely to increase state and local taxes for broadband consumers. *See* Robert Litan & Hal Singer, *Outdated Regulations Will Make Consumers Pay More for Broadband*, PROGRESSIVE POLICY INSTITUTE (Dec. 2014), *available at* http://www.progressivepolicy.org/slider/outdated-regulations-will-make-consumers-pay-broadband/.

Nevertheless, to the extent any threat to consumer welfare accrues as a result of broadband providers contracting with content providers to provide preferential service, it is my belief that the antitrust laws – and the federal agencies and private entities empowered to enforce those laws – are exceptionally well-suited to handle any such problems as they arise. These first two points establish that the FCC's decision to regulate broadband providers under Title II is both unnecessary and misguided. Unfortunately, the decision will also have the troubling consequence of stripping the FTC of jurisdiction to enforce its broad consumer protection laws against broadband providers, depriving consumers of beneficial oversight.[2]

II. Net Neutrality From an Economic Perspective

Before explaining why I believe antitrust enforcement is superior to net neutrality in promoting consumer welfare in the broadband industry, it is worthwhile first to discuss whether there are economic bases for regulating the broadband industry at all. What market failure, if any, is the FCC trying to solve with net neutrality regulations?

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[2] For additional discussion of the legal and economic issues concerning broadband competition, antitrust, and net neutrality regulation, *see* Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Net Neutrality Meets Regulatory Economics 101, Remarks Before the Federalist Society's Media and Telecommunications Practice Group Event (Feb. 25, 2015); Joshua D. Wright, Broadband Policy & Consumer Welfare: The Case for an Antitrust Approach to Net Neutrality Issues, Remarks at the Information Economy Project's Conference on US Broadband Markets in 2013 (Apr. 19, 2013); Thomas W. Hazlett & Joshua D. Wright, *The Law and Economics of Network Neutrality*, 45 IND. L. REV. 767 (2012); Jonathan E. Nuechterlein, *Antitrust Oversight of An Antitrust Dispute: An Institutional Perspective on the Net Neutrality Debate*, 7 J. TELCOMM. & HIGH TECH L. 20 (2009); Howard A. Shelanski, *Network Neutrality: Regulating With More Questions Than Answers*, 6 J. TELCOMM. & HIGH TECH L. 23 (2007).

Chairman Wheeler wrote in a recent article that "the fundamental problem [is] . . . allowing networks to act as gatekeepers."[3] The word "gatekeeper" could have some relevant economic meaning. It is important, however, to pin down exactly what we think the Chairman means by the term. There are gatekeepers everywhere. Starbucks is the gatekeeper to my morning cup of coffee and the supermarket is the gatekeeper to your access to Cheerios breakfast cereal in the supermarket aisle.[4] A gatekeeper becomes an economic problem potentially worthy of regulation only when the gatekeeper stands between consumers and the *only* source of a desirable good or service. If consumers are able to get coffee from sources other than Starbucks, then Starbucks will be unable to manipulate consumers' access to coffee in a way that makes consumers worse off because if it does, consumers are able to buy coffee from other sources. In short, it is *competition* that ensures that firms supply consumers access to the goods or services they want.

In other words, the "gatekeeper" issue identified by Chairman Wheeler is a problem worthy of regulation only insofar as the broadband industry is a natural monopoly or otherwise exhibits meaningful monopoly power – that is, the power to artificially increase market prices and decrease market output. The simple fact that

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[3] Tom Wheeler, *FCC Chairman Tom Wheeler: This Is How We Will Ensure Net Neutrality*, WIRED.COM (Feb. 4, 2015), http://www.wired.com/2015/02/fcc-chairman-wheeler-net-neutrality/.

[4] Verizon v. FCC, 740 F.3d 623, 663-64 (D.C. Cir. 2014) (Silberman, J., dissenting) (Noting that "all retail stores, for instance, are 'gatekeepers.' The term is thus meaningful only insofar as the gatekeeper by means of a powerful economic position vis-à-vis consumers gains leverage over suppliers.").

there are multiple suppliers of both wired and wireless broadband internet renders this justification of regulation unpersuasive.[5] The "gatekeeper" justification for broad-sweeping net neutrality regulation cannot possibly justify those regulations because no broadband provider can be viewed as a gatekeeper to anything when there is viable competition from other broadband providers.

On the other hand, it could be that the desire "to preserve the internet as an open platform for innovation and free expression" reflects a concern about externalities rather than about natural monopoly or monopoly power more generally.[6] Indeed, Chairman Wheeler has touted that the latest net neutrality regulation will "ban paid prioritization, and the blocking and throttling of lawful content and services."[7] Perhaps the concern is that the broadband provider and the content provider do not internalize all the costs associated with a contractual arrangement through which the content provider pays the broadband provider for priority use of the network. The argument would seem to be that there is some social interest in egalitarian access to all broadband

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[5] *See id.* at 662-667 (Silberman, J., dissenting) (explaining that the FCC failed to undertake analysis of whether broadband providers had market power in individual markets and noting that "[t]he Commission apparently wanted to avoid a disciplined inquiry focused on market power.").

[6] *See* Timothy J. Brennan, *Network Neutrality or Minimum Quality? Barking Up the Wrong Tree – and Finding the Right One*, CPI CHRONICLE (Mar. 2012) ("The relevant market failure is not insufficient competition but failure to recognize the network externality in the broadband environment: the value of internet access to a content supplier depends upon its viewers' ability to access links in its content. This market failure does not justify full net neutrality, in particular a non-discrimination rule. It does suggest a minimum quality standard . . . .").

[7] Wheeler, *supra* note 3.

providers' networks – in effect a one-size-fits-all contract between broadband providers and content providers – and that we cannot trust the marketplace to reach this outcome without regulatory intervention.

An argument that the broadband market ought to be regulated because of externalities not captured in the bargains between broadband providers and content companies may be economically coherent, but it lacks any basis in fact. At this point, the problems associated with giving certain content providers preferential access to the network – and by extension providing certain content providers with degraded access – are purely theoretical.

This concern about externalities requires consideration of the economics of the bargains between broadband providers and content providers. Broadband providers and content providers occupy different positions in the supply chain. The Netflix customer needs both content – supplied through Netflix – and broadband access – supplied through one of any number of broadband providers – in order to enjoy Netflix's video streaming product. An arrangement between Netflix and one broadband provider that ensures a certain level of speed for customers using the broadband provider's network to access Netflix is simply a vertical contractual arrangement between two entities operating as two links in the same supply chain. The world is full of these vertical contracts in all sorts of different industries. And industrial

organization economists have been studying these types of contractual arrangements for decades, so we know quite a bit about their marketplace effects generally.

It is now well accepted that vertical contracts occasionally can lead to competitive harm under certain conditions.[8] Proponents of net neutrality regulation traditionally have responded to this concern by favoring a rigid, categorical ban or other significant restrictions upon broadband providers' ability to enter into certain vertical contractual relationships. Indeed, the FCC's latest regulation includes such a ban.[9] Fearing that any network discrimination by broadband providers creates undue risk of competitive harm, net neutrality proponents argue for a categorical or "one-size-fits-all" approach. The problem is that such an approach defies modern economic learning in two ways. First, as I will explain in greater detail, the FCC's approach in its latest Order ignores the empirical economic research that demonstrates plainly that these sorts of contractual arrangements very rarely result in consumer harm. Second, economists have long understood that the types of business arrangements at issue here often provide substantial benefits for consumers.[10] For instance, such arrangements can

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[8] *See* Thomas Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 214 (1986).

[9] *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, para. 18 (Mar. 12, 2015); *see also* Wheeler, *supra* note 3 (explaining that the FCC's regulation will "ban paid prioritization, and the blocking and throttling of lawful content and services.").

[10] *See, e.g.*, Benjamin Klein, *Exclusive Dealing as Competition for Distribution "On the Merits"*, 12 GEO. MASON L. REV. 119 (2003); Oliver E. Williamson, *Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach*, 127 U. PA. L. REV 953 (1979); OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS (1975).

create efficiencies by reducing double marginalization, preventing free riding on manufacturer-supplied investments, and aligning incentives of manufacturers and distributors.[11] In fact, vertical contracts are frequently observed between firms lacking any meaningful market power, implying that there must be efficiency justifications for these practices rather than explanations that depend upon a firm with market power using them to exclude competitors. These efficiencies must be at least partially passed on to consumers in the form of lower prices, increased output, higher quality, and greater innovation. In other words, the monopoly explanation – that a monopolist uses vertical contracts to foreclose rivals from access to a critical input or a critical set of customers thereby raising the rivals' costs[12] – cannot be the reason for most instances of these types of contracts.

As I mentioned, there is considerable empirical evidence that strongly supports the view that vertical contracts are more often than not procompetitive.[13] I have

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[11] *See, e.g.*, Benjamin Klein & Joshua D. Wright, *The Economics of Slotting Contracts*, 50 J.L. & ECON. 421 (2007); Benjamin Klein & Andres V. Lerner, *The Expanded Economics of Free-Riding: How Exclusive Dealing Prevents Free-Riding and Creates Undivided Loyalty*, 74 ANTITRUST L.J. 473 (2007); Benjamin Klein & Kevin M. Murphy, *Vertical Restraints as Contract Enforcement Mechanisms*, 31 J.L. & ECON. 265 (1988); Howard Marvel, *Exclusive Dealing*, 25 J.L. & ECON. 1 (1982).

[12] *See* Krattenmaker & Salop, *supra* note 8, at 230-31.

[13] Daniel O'Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems*, *in* REPORT: THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 72-73 (2008); Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, *in* HANDBOOK OF ANTITRUST ECONOMICS (Paolo Buccirossi ed., 2009); James C. Cooper, Luke M. Froeb, Daniel O'Brien & Michael G. Vita, *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639 (2005).

summarized this body of literature in my own academic writing.[14] As one study puts it, "with few exceptions, the literature does not support the view that these practices are used for anticompetitive reasons," which supports "a fairly strong prior belief that these practices are unlikely to be anticompetitive in most cases."[15] In my view, it is fair to say that there is a general consensus among empirical economists on this point. It is, in my view, impossible to reconcile the FCC's approach with a reasonable interpretation of the best available economic theory and empirical evidence.

Furthermore, this analysis is wholly consistent with the FTC's Report on the Broadband industry from 2007.[16] The Report, which was spearheaded by now-FTC Commissioner Maureen K. Ohlhausen, explained that vertical restraints "generally need not be anticompetitive or otherwise pernicious and [are] often driven by efficiency considerations"[17] The Report concluded that although in theory vertical restraints "could prompt Internet access providers to block or degrade content or applications or charge higher prices," the "debate on net neutrality has not yet provided any good exposition of answers" to the question of whether pro- or anticompetitive outcomes are

[14] *See* Hazlett & Wright, *supra* note 2, at 800 n. 218.

[15] O'Brien, *supra* note 13, at 72-73. There is a general consensus among empirical economists on this point.

[16] FED. TRADE COMM'N STAFF, BROADBAND CONNECTIVITY COMPETITION POLICY 70-82 (2007), *available at* http://www.ftc.gov/sites/default/files/documents/reports/broadband-connectivity-competition-policy/v070000report.pdf.

[17] *Id.* at 70.

likely to occur as a result of any particular vertical restraint.[18] Surely, given the state of the economics literature and the FTC's own Report, a categorical prohibition as adopted by the FCC is inappropriate.

Finally, to the extent the Order does not prohibit certain business arrangements outright, it creates substantial uncertainty through its broad "general conduct rule," which allows the FCC substantial discretion to decide whether "new practices" "harm consumers or edge providers."[19] The uncertainty associated with the general conduct rule is likely to deter firms from engaging in all sorts of pro-consumer economic activity.

III. The Advantages of Antitrust

The FCC's latest attempt to ban paid prioritization and the blocking and throttling of lawful content is, as I have explained, a categorical prohibition on certain types of vertical contracts in the broadband industry. If there were strong evidence that the types of vertical contracts the FCC is seeking to ban harmed consumers, then a categorical ban could be justifiable on economic grounds. But, as I have explained, the best available evidence points in precisely the opposite direction: vertical contracts are far more likely to benefit consumers than to harm them. However, it is undeniably true

[18] *Id.* at 82.

[19] Fed. Comm. Comm'n, Chairman Wheeler Proposes New Rules for Protecting the Open Internet (Feb. 4, 2015), *available at* http://www.fcc.gov/document/chairman-wheeler-proposes-new-rules-protecting-open-internet.

that vertical contracts *can* result in anticompetitive outcomes in some circumstances.[20] This raises an interesting question for the FCC: if an outright ban on vertical restraints in the broadband industry cannot be justified, yet there is a chance that vertical restraints could harm broadband consumers, then what should the FCC do? The answer is "nothing," and the reason is that the FTC – my agency – is exceptionally well-equipped to pick up the slack. Were the efforts of the antitrust agencies not enough, the antitrust laws also provide for private rights of action and remedies – including treble damages – more than sufficient to put to rest concerns about inadequate enforcement. Indeed, President Obama's current regulatory czar and former director of the FTC's Bureau of Economics Howard Shelanski has noted that antitrust enforcement is often superior to broad regulation: "[e]ven if regulators have the authority to regulate, they may decide that forbearance from 'gearing up the cumbersome, highly imperfect bureaucratic apparatus of classical regulation' in favor of antitrust enforcement will be the better policy choice."[21]

The problem with the FCC's approach to net neutrality is that there is no way to identify the vertical contracts that are likely to be problematic *ex ante*. If the empirical economic evidence is correct or even reasonably accurate, then most contracts will

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[20] *See* Krattenmaker & Salop, *supra* note 8, at 224, 229.

[21] Howard A. Shelanski, *The Case for Rebalancing Antitrust and Regulation*, 109 MICH. L. REV. 683, 719 (2011) (quoting Stephen G. Breyer, *Antitrust, Deregulation, and the Newly Liberated Marketplace*, 75 CALIF. L. REV. 1005, 1007 (1987)).

benefit consumers and some will generate a real risk of competitive harm. In other words, the FCC is faced with a lack of any reliable and economically sound method to identify prospectively network discrimination that should be barred as anticompetitive or absolved as procompetitive.

But what is a novel policy dilemma for the FCC is a problem that antitrust has been grappling with for over a century and for which it offers a clear solution. Over the course of the last century, antitrust jurisprudence has evolved a highly sophisticated "rule of reason" to adjudicate various types of vertical arrangements by analyzing their costs and benefits.[22] The rule of reason requires that each vertical arrangement be assessed on a case-by-case basis by marshaling the available economic literature and empirical evidence to evaluate the evidence of actual competitive harm under the specific circumstances of the case. Indeed, antitrust law initially adopted but ultimately rejected – largely based upon the development of the economic and empirical literature I discussed earlier – a categorical prohibition of certain vertical restraints not unlike the FCC's prohibition on paid prioritization.[23]

The reason antitrust courts and agencies rejected the view underlying the President and the FCC's ban is that a revolution injecting economic analysis and

[22] *See* Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).

[23] *See, e.g.*, Leegin Creative Leather Prods v. PSKS, Inc., 551 U.S. 877 (2007) (applying rule of reason to minimum resale price maintenance); State Oil Co. v. Kahn, 522 U.S. 3 (1997) (applying rule of reason to maximum resale price maintenance); Continental T.V. v. GTE Sylvania, 433 U.S. 36 (1977) (applying rule of reason to non-price vertical restraints).

method into antitrust law swept through its institutions in the 1960s and 1970s. The FCC need not catch up its understanding of industrial organization economics to the state of the art in 2015 to get this right; it only needs to embrace what was well understood by 1977 when the Supreme Court first accepted the basic economic principles that rejected categorical prohibitions of the sort embraced by net neutrality proponents.[24]

My view is that antitrust's rule of reason is far more likely to maximize consumer welfare in the broadband industry than the FCC's ban. As a general matter, any legal framework that seeks to maximize consumer welfare must take three factors into account. First, the framework must assess the probability that the challenged business arrangement is anticompetitive. Second, the framework must assess the probability that its application will result in errors, either false positives in which arrangements that benefit consumers are prohibited or false negatives in which arrangements that harm consumers are allowed. Third, the framework must acknowledge the administrative costs of implementing the system.[25] A rule that focuses upon minimizing the social costs of false positives, false negatives, and administrative costs is most likely to generate the highest rate of return for consumers.

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[24] *See GTE Sylvania*, 443 U.S. 36.

[25] Hazlett & Wright, *supra* note 2, at 798.

Under the FCC's categorical prohibition, there will be no false negatives, only false positives. Instances of procompetitive conduct will no doubt be erroneously condemned unless one thinks the empirical research on the effects of vertical restraints is all wrong, at least as applied to the broadband industry. It is true that the rule of reason is probably more costly to administer in the individual case than the FCC's blanket prohibition, but the administrative cost the FCC incurs in developing, defining, and defending, and re-defining whatever net neutrality order ultimately gets upheld by a court – and it has not been successful in this endeavor for a decade – is not trivial either.

Although the affirmative case for antitrust over net neutrality is clear on consumer welfare grounds, net neutrality proponents often assert that because antitrust might not "work" in all cases – that is the rule of reason might allow *some* vertical contracts that do in fact harm consumers – a blanket prohibition against all priority contracts is superior. This argument rejects a consumer-welfare based approach to regulation altogether by assuming – contrary to all available theory, evidence, and experience – that every instance of conduct prohibited by the FCC's plan will be harmful. The argument also seems to suggest that there is some category of harm to consumers that falls outside of the dimensions cognizable within antitrust and consumer protection law – price, output, quality, and innovation – that is both ubiquitous enough to justify categorical prohibition but also only observable to the

FCC. That should be enough make any student of regulatory law or economics nervous. I am quite confident that the antitrust regime, after more than a century of developing expertise in applying the rule of reason, will be able to apply it to the broadband industry.

IV. Title II and Consumer Protection

I will now turn from antitrust to the FTC's other enforcement priority: consumer protection. By reclassifying broadband internet providers as common carriers under Title II, the FCC threatens to strip the FTC of its jurisdiction to regulate broadband providers as part of its consumer protection mission. The FTC has been active in this space over the last 20 years, and the FCC's regulation would displace much pro-consumer activity. I believe reclassification under Title II will unequivocally harm consumers by depriving consumers of the FTC's activities in the broadband sector.

As a general matter, the FTC Act gives the FTC broad authority with regard to both competition and consumer protection matters in most sectors of the economy.[26] Section 5 of the FTC Act proscribes "deceptive" or "unfair" acts or practices in or affecting commerce. A company acts deceptively if it makes materially misleading statements or omissions. Such statements or omissions can be express or implied. A

[26] Under the FTC Act, "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce," are prohibited, and the FTC has a general statutory mandate "to prevent persons, partnerships, or corporations," from engaging in such prohibited methods, acts, and practices. 15 U.S.C. § 45 (a).

company engages in unfair acts or practices if its practices cause, or are likely to cause, substantial injury to consumers that is neither reasonably avoidable by consumers themselves nor outweighed by countervailing benefits to consumers or to competition. Section 5's prohibition against deceptive or unfair practices plays an important role in protecting consumers: put simply, it requires companies to market their products truthfully and to refrain from engaging in harmful business practices. Section 5 also promotes competition on the basis of truthful claims and provides an incentive for companies to act responsibly and fairly in providing their products and services.

Although Section 5 contains an exemption for "common carrier" activities, this exemption does not apply to the provision of other services, even if offered by common carriers.[27] Accordingly, because broadband internet access services historically have not been offered on a common carrier basis,[28] the FTC has had jurisdiction over such services.[29] The FTC has used its full range of law enforcement authority to protect

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[27] 15 U.S.C. §§ 44, 45(a)(2). *See* FTC v. Verity Int'l, Ltd., 443 F.3d 48, 58-60, n.4 (2d Cir. 2006) (citing, *inter alia*, SW Bell Tel. Co. v. FCC, 19 F.3d 1475, 1481 (D.C. Cir. 1994), and Nat'l Ass'n of Reg. Util. Comm'rs v. FCC, 533 F.3d 601, 608 (D.C. Cir. 1976)).

[28] Verizon v. FCC, 740 F.3d 623, 650 (D.C. Cir. 2014)); Nat'l Cable Telecomm'ns Ass'n v. Brand X Internet Servs., 545 U.S. 967, 993-95 (2005).

[29] The FCC's historical exercise of authority over non-common carrier broadband Internet access services pursuant to Title I of the Communications Act of 1934, 47 U.S.C. §§ 151-161, and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 1302, has no bearing on the scope of the FTC's jurisdiction, since, under Sections 5(a) and 13(b) of the FTC Act, 15 U.S.C. §§ 45(a) & 53(b), "the FTC may proceed against unfair practices even if those practices [also] violate some other statute...." FTC v. Accusearch, Inc., 570 F.3d 1187, 1195 (10th Cir. 2009) (referring to Telecommunications Act provision). *See also*, FED. TRADE COMM'N STAFF, *supra* note 16, at 38-41 (2007) (analyzing the application of Section 5 of the FTC Act to broadband services).

consumers in the broadband sector, including obtaining injunctive relief and consumer redress where appropriate, and engaging in consumer and business education. The FTC has also pursued policy initiatives to address important consumer protection issues relating to broadband and Internet service, including requiring truthful, clear, and conspicuous disclosure of material terms of service, data security, and privacy.

Importantly, the FTC has certain enforcement tools at its disposal that are not available to the FCC. Unlike the FCC, the FTC can bring enforcement cases in federal district court and can obtain equitable remedies such as consumer redress.[30] The FCC has only administrative proceedings at its disposal, and rather than obtain court-ordered consumer redress, the FCC can require only a "forfeiture" payment.[31] In addition, the FTC is not bound by a one-year statute of limitations as is the FCC.[32] The FTC's ability to proceed in federal district court to obtain equitable remedies that fully redress consumers for the entirety of their injuries provides comprehensive consumer protection and can play an important role in deterring consumer protection violations.

The FTC has done some remarkable consumer protection work in the broadband sector and, since the advent of the Internet, the FTC has been the primary federal enforcement agency identifying problematic practices relating to deceptive advertising,

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[30] *See* 15 U.S.C. Sec. 53(b). By contrast, the FCC cannot obtain consumer redress, only forfeiture.

[31] In the settlement of an administrative proceeding, a party may agree to pay consumer redress or to set up a compensation fund. However, the party cannot be compelled to do so.

[32] 47 U.S.C. § 503(b)(6).

privacy and data security, as well as enforcement actions designed to stop these practices and to deter others from adopting similar practices that harm consumers. Before reclassifying broadband services under Title II, and thereby outside the reach of the FTC, it is important to consider the ramifications of depriving broadband consumers of the FTC's specialized enforcement abilities as well as its accompanying decades of expertise.

A few recent enforcement efforts illuminate the types of protections consumers would lose with reclassification. For example, the FTC recently filed an action against AT&T in federal district court, charging that AT&T failed to adequately disclose to its customers on unlimited data plans that, if they reach a certain amount of data use in a given billing cycle, AT&T reduces – or "throttles" – their data speeds to the point that many common mobile phone applications – like web browsing, GPS navigation and watching streaming video – become difficult or nearly impossible to use.[33] The FTC complaint further alleges that, even as unlimited plan consumers renewed their contracts, the company still failed to inform them of the throttling program. When customers canceled their contracts after being throttled, AT&T charged those customers early termination fees, which typically amount to hundreds of dollars. The FTC also brought and settled a nearly identical case against Tracfone, the largest prepaid mobile

[33] Press Release, Fed. Trade Comm'n, FTC Says AT&T Has Misled Millions of Consumers with 'Unlimited' Data Promises (Oct. 28, 2014), https://www.ftc.gov/news-events/press-releases/2014/10/ftc-says-att-has-misled-millions-consumers-unlimited-data.

provider in the U.S.[34] In that case, Tracfone agreed to pay $40 million to the FTC for consumer redress to settle charges that it deceived millions of consumers with its promises of "unlimited" data service.

I am sure many of you are familiar with these recent Commission cases. These are very important cases to bring – they challenge deceptive practices that harm consumers not only by charging them for services they did not receive, but also by undermining the competitive landscape. However, it is important to recognize that the FTC is not new to these and other important consumer protection issues in the broadband sector. Indeed, the FTC has been on the forefront of such cases since the late 1990's and it has continually brought a variety of cases against Internet service providers when it has had reason to believe that they have engaged in deceptive marketing and billing practices.[35]

For example, in 1997, the FTC separately sued America Online, CompuServe, and Prodigy, alleging that each company had offered "free" trial periods that resulted in unexpected charges to consumers.[36] The settlement orders reached in these matters

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[34] Press Release, Fed. Trade Comm'n, Prepaid Mobile Provider TracFone to Pay $40 Million to Settle FTC Charges It Deceived Consumers About 'Unlimited' Data Plans (Jan. 28, 2015), https://www.ftc.gov/news-events/press-releases/2015/01/prepaid-mobile-provider-tracfone-pay-40-million-settle-ftc.

[35] *See, e.g.*, Am. Online, Inc. & CompuServe Interactive Servs., Inc., 137 F.T.C. 117 (2004); Juno Online Servs., Inc., 131 F.T.C. 1249 (2001).

[36] *See* Am. Online, Inc., 125 F.T.C. 403 (1998); CompuServe, Inc., 125 F.T.C. 451 (1998); Prodigy, Inc., 125 F.T.C. 430 (1998). One Prodigy advertisement, for example, touted a "Free Trial" and "FREE 1ST MONTH'S MEMBERSHIP" conspicuously, while a fine print statement at the bottom of the back panel of the advertisement stipulated: "Usage beyond the trial offer will result in extra fees, even during the first

prohibited the companies from, among other things, misrepresenting the terms or conditions of any trial offer of online service. Although all three matters involved dialup, or narrowband, Internet access, the orders are not limited by their terms to narrowband services.

In another early case, the FTC was granted summary judgment by a federal district court that that the defendants had violated the FTC Act by mailing false or misleading purported rebate or refund checks to millions of consumers and businesses without disclosing, clearly and conspicuously, that cashing the checks would prompt monthly charges for Internet access services on the consumers' and businesses' telephone bills. [37] Following a trial on the issue of consumer injury, the court ordered the defendants to pay more than $17 million to remedy the injury caused by their fraudulent conduct.[38]

Enforcement actions such as these not only protect consumers from financial injury, they are an important component in policing the marketplace and ensuring the flow of accurate and truthful information.

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month." Other alleged misrepresentations included AOL's failure to inform consumers that fifteen seconds of connect time was added to each online session (in addition to the practice of rounding chargeable portions of a minute up to the next whole minute), as well as its misrepresentation that it would not debit customers' bank accounts before receiving authorization.

[37] FTC v. Cyberspace.com, No. C00-1806L, 2002 WL 32060289 (W.D. Wash. July 10, 2002), aff'd, 453 F.3d 1196 (9th Cir. 2006).

[38] *Cyberspace.com*, 453 F.3d at 1196 (the Court of Appeals for the Ninth Circuit affirmed the trial court's liability).

The FTC's unique expertise extends to privacy and data security as well. The FTC has the authority -- under a handful of different laws -- to bring cases enforcing broadband service providers' obligations to protect the privacy and security of consumer data. Using its authority under Section 5, the FTC has brought privacy and security enforcement actions that have involved businesses in a wide variety of industries, including companies that sell mobile and Internet connected devices;[39] companies that provide Internet-related services;[40] social media companies;[41] and mobile app developers.[42] In addition to the FTC Act, other laws enforced by the FTC, such as the Fair Credit Reporting Act[43] ("FCRA"), and the Children's Online Privacy Protection Act[44] ("COPPA"), also prohibit entities including broadband operators from making deceptive claims in their representations to consumers about privacy and data security. Further, they impose a variety of other requirements that may apply to broadband providers engaging in certain activities.

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[39] HTC America, Inc., 155 F.T.C. 1617 (2013); TRENDnet, Inc., FTC Docket No. C-4426 (Jan. 16, 2014) (final decision and order), *available at* https://www.ftc.gov/system/files/documents/cases/140207trendnetdo.pdf.

[40] Google, Inc., 152 F.T.C. 435 (2011).

[41] Facebook, Inc., FTC Docket No. C-4365 (July 27, 2012) (final decision and order), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2012/08/120810facebookdo.pdf.

[42] Snapchat, Inc., FTC Docket No. C-4501(Dec. 23, 2014) (final decision and order), *available at* https://www.ftc.gov/system/files/documents/cases/141231snapchatdo.pdf; United States v. Path, Inc., No. C-13-0448 (N.D. Cal. Feb. 8, 2013) (Stipulated Final J.), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/02/130201pathincdo.pdf.

[43] 15 U.S.C. §§15 U.S.C. §1681-1681x.

[44] 15 U.S.C. §§ 6501-6506.

These enforcement actions clearly illustrate the expertise and the interest of the FTC in vigorously protecting consumers of broadband internet services. Consumers have been well served to the extent that this framework allows both the FTC and the FCC to challenge deceptive and unfair practices and thereby foster competition and protect consumers. As the Commission has pointed out many times, however, the common carrier exemption is outdated and a harmful obstacle to good policymaking.[45] As illustrated by the broadband Internet access marketplace, technological advances have blurred the traditional boundaries among telecommunications, entertainment, and high technology. As the telecommunications and Internet industries continue to converge, the common carrier exemption is likely to continue to frustrate the FTC's ability to stop deceptive and unfair acts and practices and unfair methods of competition with respect to interconnected communications, information, and entertainment services. Reclassifying broadband internet services as common carrier services under Title II will create further obstacles to protecting consumers and fostering competition by depriving the FTC of its long-standing jurisdiction in this area

[45] *See, e.g., Federal Trade Commission Reauthorization: Hearing before the S. Comm. on Commerce, Science, and Transportation*, 108th Cong. 12-13 (2008) (statement of William E. Kovacic, Chairman, Fed. Trade Comm'n); *FTC Jurisdiction Over Broadband Internet Access Services: Hearing before the S. Comm. on the Judiciary*, 109th Cong. 9-11 (2006) (statement of William E. Kovacic, Comm'r, Fed. Trade Comm'n); *Reauthorization of the Federal Trade Commission: Positioning the Commission for the Twenty-First Century: Hearing before the H. Subcomm. on Commerce, Trade, and Consumer Protection of the Comm. on Energy and Commerce*, 108th Cong. 35-36 (2003) (statement of Thomas B. Leary, Comm'r, Fed. Trade Comm'n).

and threatening the robust consumer protection efforts that the agency has engaged in over the last two decades.

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Thank you for your time. I am happy to answer any questions.

Mr. GOODLATTE. Thank you, Commissioner.
Commissioner McSweeny, welcome.

TESTIMONY OF THE HONORABLE TERRELL P. McSWEENY, COMMISSIONER, FEDERAL TRADE COMMISSION

Ms. MCSWEENY. Thank you. Thank you very much. And I want to thank the Members of the Committee and Ranking Member Conyers for the invitation to appear today.

My name is Terrell McSweeny, and I am also a Federal Trade Commissioner. Like my colleague, Commissioner Wright, I will begin by making the usual disclaimer. I am speaking on behalf of myself and not the commission or my colleagues.

I am delighted to talk to you today about the role of competition enforcers like the Federal Trade Commission in protecting consumers and competition. For 100 years, the Federal Trade Commission has worked to ensure that American consumers and the entrepreneurs who bring new and exciting products to the marketplace are free from anticompetitive, deceptive, and unfair practices that threaten to harm them.

The FTC's role as a consumer protection and antitrust enforcer has evolved along with the economy, adapting to the interconnectedness of our 21st century lives to protect consumers online and on mobile platforms. In the last decade, the FTC has brought more than 100 cases involving consumer data security and privacy, and we have cracked down on emerging issues such as cramming on mobile phone bills, and unauthorized in-app purchases by children, winning millions of dollars in redress for consumers harmed by these practices.

The FTC plays an important role promoting innovation by advocating for competition that can be introduced by disruptive entrance, and by investigating and prosecuting anticompetitive practices across a wide variety of industries. While antitrust enforcement is vital to protecting a competitive marketplace, it is not always the most effective way to address policy issues in the economy.

Sometimes the public interest is best protected through a combination of antitrust enforcement and well-designed regulation. Protecting the virtuous cycle of the Open Internet is one of these instances.

The debate over the best way to protect the Open Internet raises a host of complicated issues, including public policy issues that go beyond the scope of antitrust and consumer protection enforcement. The FCC has spent years studying the Open Internet issue, informed by the data and input from market participants, academics, and the views of nearly 4 million commenters.

On the basis of that record, the FCC concluded that Internet openness promotes a virtuous cycle, in which innovation by providers of new content, applications, and services generates increased consumer broadband demand. This increase in broadband demand increases broadband infrastructure investment, which in turn spurs new innovation from content producers.

Ex post, case-by-case antitrust enforcement is unable to offer the same protections to innovators in the content space as clear, ex ante rules.

Under the Open Internet order, innovators who seek to provide new content, applications, and services can have confidence that discriminatory network access will not threaten their chances of competitive success. Antitrust enforcement, on the other hand, would require detection, investigation, and a potentially lengthy rule of reason analysis.

I would also like to point out that the FCC considered First Amendment interests, freedom of expression, diversity of political discourse, and cultural development as a part of the Open Internet proceeding. These are noneconomic, but very important values that are not generally protected by antitrust laws.

I want to stress that there is not an either/or choice that must be made between FCC regulation and FTC enforcement as it relates to the Open Internet. Both are different tools with different features, and both have a role to play when it comes to protecting consumers and ensuring an Internet that continues to foster competition and innovation.

The optimum outcome for consumers is Open Internet coupled with repeal of the common carrier exemption in the FTC Act, which may hinder the FTC from protecting consumers against unfair and deceptive common carrier activities.

The FTC has decades of experience and specific statutory tools, such as consumer redress, that complement FCC oversight of common carriers, and we have a long history of successfully working together with the FCC and look forward to continuing to work with them.

I will conclude by pointing out that the status quo in the United States is overwhelmingly one of an Open Internet. It is almost out-of-date to refer to the Internet as its own sector somehow detached from the rest of the economy. The Internet has truly become the Internet of everything. It is the medium that we use to carry on friendships, file our taxes, book vacations, talk to our doctors, watch movies, manage businesses, and increasingly coordinate our lives from the moment we get up until the time we go to bed. Ensuring that the Internet remains a fountain of innovation and disruption is at the heart of Open Internet policy.

I don't view this as a situation in which the FCC's Open Internet order threatens to usher in some new and unproven market reality. Rather, it is the elimination of the Open Internet in this country that would put us in unchartered territory.

Thank you for holding this hearing and for having me here, and I look forward to answering your questions.

[The prepared statement of Ms. McSweeny follows:]

PREPARED STATEMENT OF

COMMISSIONER TERRELL P. McSWEENY

FEDERAL TRADE COMMISSION

Before the

UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

WASHINGTON D.C.

MARCH 25, 2015

Statement of Commissioner Terrell McSweeny
House Judiciary Committee
March 25, 2015

Good afternoon, I want to thank Chairman Goodlatte and Ranking Member Conyers for having me here today to speak about the role enforcement agencies, like the Federal Trade Commission, play in protecting consumers and competition.

Before beginning my testimony, I must stress that I am speaking only for myself and not on behalf of the Commission or my colleagues.

For 100 years, the FTC has worked to ensure that American consumers and the entrepreneurs who bring new and exciting products to the marketplace are free from anticompetitive, deceptive, and unfair practices that threaten to harm them. The FTC's role as a consumer protection and antitrust enforcer has evolved along with the economy – adapting to the interconnectedness of our 21st century lives to protect consumers online and on mobile platforms. In the last decade, the FTC has brought more than 100 cases involving consumer data security and privacy. We have cracked down on emerging issues such as cramming and unauthorized in-app purchases by children – winning millions of dollars in redress for consumers harmed by these practices.

The FTC also plays an important role promoting innovation by advocating for the competition that can be introduced by disruptive entrants. In the last few years, the FTC has urged that cities and taxicab authorities not impede competition from new ride-sharing platforms such as those offered by Uber and Lyft. FTC officials have publicly criticized as "bad policy" state laws designed to protect the automobile dealership model from competition from Tesla's direct-to-consumer sales strategy. The FTC also investigates and prosecutes anticompetitive practices across a wide variety of industries. The Commission's competition enforcement is guided by antitrust principles. While antitrust enforcement is vital to protecting a competitive marketplace, it is not always the most effective way to address policy issues in the economy.

Sometimes the public interest is best protected through a combination of antitrust enforcement and well-designed regulation. Protecting the "virtuous cycle" of the open Internet is one of these instances.

The open Internet raises a host of complicated issues, including public policy issues that go beyond the scope of antitrust and consumer protection enforcement. The FCC has spent years studying the open Internet issue, informed by data and input from market participants, academics, and the views of nearly four million commenters. On the basis of that record, the FCC concluded that Internet openness promotes a "virtuous cycle" in which innovation by providers of new content, applications, and services generates increased consumer broadband demand. This increases broadband demand, which increases broadband infrastructure investment, which, in turn, spurs new innovation from content producers.[1] The D.C. Circuit has

[1] *See* FCC Open Internet Order ¶ 7 (Mar. 12, 2015).

upheld the FCC's findings with respect to this "virtuous cycle"[2] – findings based on the FCC's sector-specific mandate and specialized expertise in the area of telecommunications.

Ex post, case-by-case antitrust enforcement is unable to offer the same protections to innovators in the content space as clear, *ex ante* rules. Under the Open Internet Order, innovators who seek to provide new content, applications, and services can have confidence that discriminatory network access will not threaten their chances for competitive success. Antitrust enforcement, on the other hand, would require detection, investigation, and a potentially lengthy "rule of reason" analysis.

The FCC also considered First Amendment interests such as free expression, diversity of political discourse, and cultural development as part of its Open Internet proceeding. These are non-economic values that are not generally protected by the antitrust laws.

There is not an either-or choice that must be made between FCC regulation and FTC enforcement as it relates to an open Internet. Both are different tools with different features and both have a role to play when it comes to protecting consumers and ensuring an Internet that continues to foster competition and innovation.

Consumers benefit when there is robust competition for existing and new products and services, and when consumers can make choices dictated by their own preferences. The optimum outcome for consumers is Open Internet coupled with repeal of the common carrier exemption that may hinder the FTC from protecting consumers against unfair and deceptive common carrier activities. The FTC has decades of experience, and specific statutory tools such as consumer redress, that complement FCC oversight of common carriers. We have a long history of successfully working together with the FCC and look forward to continuing that tradition of shared jurisdiction.

I'll conclude by pointing out that the status quo in the United States is, overwhelmingly, that of an open Internet. It is almost out of date to refer to the Internet as its own sector, somehow detached from the rest of the economy. The Internet has truly become "The Internet of Everything." It is the medium that we use to carry on friendships, file our taxes, book vacations, speak to our doctors, watch movies, manage businesses, and, increasingly, coordinate our lives from the time we get up to the time we go to bed. We have already witnessed the tremendous spillover effects and positive externalities that an open Internet has provided. Ensuring that the Internet remains a fountain of innovation and disruption is at the heart of open Internet policy. This is not a situation where the FCC's Open Internet Order threatens to usher in some new and unproven market reality. Rather, it is the *elimination* of the open Internet in this country that would put us in uncharted territory.

Thank you again for holding this hearing and having me here. I look forward to your questions.

[2] *See Verizon v. FCC*, 740 F.3d 623, 659 (D.C. Cir. 2014).

Mr. GOODLATTE. Thank you, Commissioner McSweeny.

Before we begin the questioning by Members of the Committee, I will ask unanimous consent to enter into the record a letter dated today from the Consumer Electronics Association on behalf of its more than 2,000 U.S. technology companies, indicating support for an Open Internet and expressing concern that the swath of Title II regulations and legal challenges to FCC authority will cause uncertainty, slow investment, reduce competition, and hinder innovation, and calling on Congress to take action in this area.

[The information referred to follows:]

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March 25, 2015

The Honorable Bob Goodlatte
United States House of Representatives
2309 Rayburn House Office Building
Washington, DC 20515

The Honorable John Conyers, Jr.
United States House of Representatives
2426 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Goodlatte and Ranking Member Conyers,

The Consumer Electronics Association (CEA), on behalf of its more than 2000 U.S. technology companies, appreciates your attention to the Federal Communications Commission's (FCC) recent decision to reclassify broadband Internet services as "telecommunications services" subject to Title II regulation of the Telecommunications Act of 1996.

We support an open Internet, but are concerned that the swath of Title II regulations and legal challenges to FCC authority will cause uncertainty, slow investment, reduce competition and hinder innovation. We urge Congress to act to restore certainty and give the FCC clear—but limited—authority to preserve an open and competitive Internet.

The near-certain short term alternative to congressional action is lengthy litigation. No matter which party claims the White House next, new FCC appointees will face a Title II litmus test because the FCC action was so controversial and such a break from prior interpretations. Longer term, a new Commission could reverse its decision or change the scope of its forbearance from certain provisions of Title II, triggering another net neutrality battle. A bipartisan Congressional agreement that forecloses these foreseeable and detrimental outcomes will benefit investment in broadband infrastructure, new services on the Internet and the clarity of law that American citizens expect and deserve.

Our nation has led the world in almost every aspect of the Internet since its invention. We have done so with limited government intervention, allowing the entire Internet ecosystem to grow and provide vast benefits to consumers worldwide. The Internet is still evolving. Congress must support this evolution using clear statutory language that encourages broadband investment and competition throughout all elements of the Internet ecosystem, while preserving the openness that has made the Internet a dynamic engine of innovation.

In short, we ask you to protect consumers, U.S. businesses, and the Internet itself from the uncertainty swirling around the FCC's decision to reclassify broadband Internet services as Title II telecommunications services.

Sincerely,

Gary Shapiro
President and CEO

Mr. GOODLATTE. Secondly, I would ask unanimous consent to enter into the record the dissenting opinion of the FCC Commissioner Mr. Pai.*

Without objection, they will be made a part of the record.

And we will turn to the questioning.

If I may, I will start with you, Chairman Wheeler. Can you please walk us through the many specific examples of anticompetitive actions taken by Internet service providers over the last 3 years that support issuing massive regulations on the Internet?

To be clear, I am looking for actual examples of bad conduct rather than hypothetical conduct. To my knowledge, there were not any specific examples cited in the 300-plus page order.

Mr. WHEELER. Thank you, Congressman. Yes, I would be happy to. I think the root is what the district court said when they said that there is the technological capability and the economic incentive to do something.

Mr. GOODLATTE. I am talking about actual examples where it has taken place in the last 3 years.

Mr. WHEELER. So for instance, in 2007, a Republican commission moved against wireless carriers who were doing exactly the same kind of thing we are talking about here, and used Title II to deal with that. What was happening was the wireless carriers, the big guys, were saying to the small guys, "Your customers can't roam onto our turf, onto our networks."

Mr. GOODLATTE. Chairman Wheeler, let me interrupt because that was 8 years ago that that took place, and we are talking about in the last 3 years. But let me give you another question.

To the extent that actual anticompetitive conduct was occurring on the Internet and the FCC chose not to intervene, why wouldn't the Federal Trade Commission be able to prosecute that conduct under current law?

Mr. WHEELER. Thank you, Congressman. I was going to get to more recent things, if you are interested. I mean, there are examples of blocking of iPhone apps, iPad apps, Android apps, blocking a mobile wallet app that was put on the phone, limiting access to Google Voice. And as recently as last August, Verizon tried to throttle the data speeds for users who had bought unlimited access. So there is a list, and I can go through others, if you want.

Mr. GOODLATTE. Let me ask Commissioner Pai if he wants to shed light on that. Why is it that there were no examples cited in the report?

Mr. PAI. That is a key question, Mr. Chairman. The answer is, as detailed in the FCC's decision, there is no evidence of a system-wide failure in the Internet marketplace. The fact that the agency has to rely on a decade-old example of a small ISP in North Carolina, of isolated niche examples since then, all of which were solved through private initiatives, not through the application of heavy-handed Title II rules, demonstrates that there was no problem to be solved here.

Mr. GOODLATTE. Will there be an increase in State and local taxes levied against Internet service providers as a result of the

*__Note:__ The submitted material, the dissenting opinion of the FCC Commissioner, is not printed in this hearing record but is on file with the Committee and can be accessed at:

http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=103236.

Open Internet order? And will the Internet Tax Freedom Act, something that has very strong bipartisan support here in the Congress, protect against all of these types of taxes?

Mr. PAI. Mr. Chairman, I believe the answer to the question is no. The order explicitly opens the door to the imposition of billions of dollars of new taxes, the most notable of which is the assessment of Universal Service Fund fees or taxes on broadband. The only thing the order promises is that those fees won't go up on the effective date of the order itself.

Moreover, there are a number of State and local fees and taxes which will be assessed. One example, which flows from the reclassification of broadband as a Title II telecom service, is pole attachment rates. Previously, a lot of the competitive providers were able to avail themselves of a relatively lower rate, applicable to cable companies. Now that rate will go up to a higher rate that telecom providers pay.

All of those costs will be passed on to the consumer.

Mr. WHEELER. Mr. Chairman, can I——

Mr. GOODLATTE. Let me turn to Commissioner Wright, and if I have some time left, I will come back to you, Mr. Chairman.

The FCC adopted the one-size-fits-all regulatory approach in its Open Internet order. Why is it important to evaluate each anticompetitive action on its merits using decades of antitrust case law and deploying an economic analysis? At the end of the day, what is better for consumers?

Mr. WRIGHT. Thank you for the question, Mr. Chairman.

I think it is important to note that sometimes this idea that antitrust is ex post and regulation is ex ante is a bit overplayed. Antitrust has ex ante regulations. For example, we ban all price-fixing. Sometimes, we have broad prohibitions like you see here. Sometimes we don't. We used to have ex ante, broad prohibitions on vertical restraints.

The reason we don't, and the reason that antitrust, starting about 40 years ago, went to a case-by-case approach is because an economic revolution of both theory and empirical data on vertical restraints hit the world in the '60's and '70's and '80's. And what we learned was not only were these types of contracts unlikely to harm competition, but importantly, oftentimes, they offer serious benefits for consumers.

The virtue of a case-by-case approach isn't just how often that you can attack or detect anticompetitive conduct. It is allowing consumers to reap the benefits of the conduct when it is procompetitive. And that is the difference between a case-by-case approach and a per se prohibition, and why it is important to retain the former.

Mr. GOODLATTE. Thank you.

My time has expired, but, Chairman Wheeler, we will give you a moment to add what you wanted to add a moment ago.

Mr. WHEELER. Well, I was just going to say that what Commissioner Pai said about taxes isn't quite as portrayed. The reality of property taxes is that they are on telephone companies "and utilities." And we do not reclassify and specifically address in the order that that does not deal with this.

The second issue——

Mr. GOODLATTE. It could be done in the future, though, could it not?

Mr. WHEELER. It specifically says in the order that we are talking about telecommunication——

Mr. GOODLATTE. Once you go down this road, a future FCC could change that order and go that direction as well, could they not?

Mr. WHEELER. Mr. Chairman, future companies can behave in ways that they tell us that they are not going to behave as well. We all live with this.

Mr. GOODLATTE. And future Congresses.

Mr. WHEELER. Valid point.

One other point is the issue of application of Universal Service against broadband. Commissioner Pai sits on the bipartisan Federal-State board that will deal with that issue. So there will be a recommendation coming from them, which Commissioner Pai, in which he will be participating. But even if they come back and say you should change the contribution, it is not an increase in the amount collected; it is just that it gets applied to different things.

So, essentially, in a household, it becomes the same kind of a number.

Mr. GOODLATTE. We will follow up on that in a moment, but my time has expired, so we will turn now to the gentleman from Michigan, Mr. Conyers, for his questions.

Mr. CONYERS. Thank you.

Well, I am very interested in this discussion. Let me just ask, Mr. Wheeler, how has FCC encouraged competition and innovation over communications networks?

Mr. WHEELER. Thank you very much, Congressman.

The joke around the FCC is that my mantra has been "competition, competition, competition," or, more appropriately, spoken as "competition-competition-competition," because it ought to be the ultimate mantra of everything we do.

And the difficulty that we face today is that, insofar as high-speed networks in this country, about 80 percent of Americans have either only one choice or zero choice. About 25 percent of them have zero choice for high-speed networks. And what we need to be doing is encouraging that.

That is why specifically in this order we said that we will not have rate regulation, we will not have tariffing, we will not have unbundling, those kinds of things associated with the so-called utility status, because we want to create an environment in which carriers are investing in ever-faster, evermore ubiquitous, competitive broadband services.

The interesting thing is that Wall Street seems to agree, because if this was the end of the world that everybody keeps talking about, then you would think you would see the stocks crashing. Instead, the stocks have been going up. And on the day of the vote even, when we adopted the rule, they went up.

So it is very important that we build a strong economic base so that carriers are incentivized to build competitive, ever-faster networks.

Mr. CONYERS. One of your colleagues says the Internet is not broken, and there is nothing for the FCC to fix, and it is only based on hypotheticals. Is there much truth in that or any?

Mr. WHEELER. Thank you, Congressman.

You know, Mr. Walden and Mr. Upton and Senator Thune have all introduced legislation to ban blocking, ban throttling, ban paid prioritization—the three big things that we ban in our order. So there is, I think, a suggestion that at least some other people other than us feel that there are difficulties in the marketplace.

We did have the instance of Comcast blocking. We did have the instance I told the Chairman about of Verizon throttling.

Verizon, interestingly enough, went into court when they were suing to overturn the 2010 rules, and their lawyer said: I have been specifically instructed to tell the court that one of the reasons we are appealing is because we want to do paid prioritization.

Then in a letter to Chairman Leahy, when he was chairing the Senate Judiciary Committee, the major ISPs, when asked if they would pledge to not do paid prioritization, they said we do not foresee. They did not say they would not.

Our rule says you will not. And again, I go back to what the court said, which was that there is an incentive, an economic incentive, and a technological capability for these network providers to harm innovation, to harm competition, and to harm this virtuous circle of innovation driving new networks, which drive more innovation, et cetera.

Mr. CONYERS. Very interesting.

Commissioner McSweeny, what are potential limitations in relying on antitrust enforcement to protect an Open Internet?

Ms. MCSWEENY. Thank you for the question. I would note there are a couple of problems here.

One, and it is not an insignificant one, is detection. First, it might be very difficult for antitrust enforcers to detect some of these problems because it is hard sometimes for consumers to even know that they are happening.

The second would be just to note that because, by its nature, antitrust enforcement is after the fact, it is on a case-by-case basis after an intensive investigation. It can be very difficult to remediate harms.

So if your concern is about the innovators who never get to consumers, or the consumers who never get to the innovators, it can be very difficult to rely solely on antitrust to protect that.

Mr. CONYERS. Let me ask you, finally, can we get FCC and FTC to cooperate in enforcement and regulation?

Ms. MCSWEENY. Absolutely, sir. In fact, we already have a long history of cooperating together quite successfully.

Mr. CONYERS. Very good. Glad to hear it.

Thank you, all.

Mr. GOODLATTE. Thank you, Mr. Conyers.

The Chair now recognizes the gentleman from Virginia, Mr. Forbes, for 5 minutes.

Mr. FORBES. Mr. Chairman, thank you.

Commissioner Pai, you heard I believe Chairman Wheeler mention something about a redistribution of taxes to all companies. Do you agree with him? Or can you give us your thoughts on that?

Mr. PAI. Thank you for the question, Congressman. I respectfully disagree with the Chairman.

First of all, nothing the FCC says about the classification of broadband provided for tax purposes binds any State and local authority. The mere fact that they are now telecom providers means that the door is open for State and local entities to reclassify them as such.

If I could enter into the record the Washington Post "Fact Checker" that just came out today, suggesting that a left-leaning Progressive Policy Institute study indicating that $11 billion in State and local fees would be raised is, in fact, the case.

Mr. FORBES. I would request that we allow that to be submitted.

Mr. GOODLATTE. Without objection, that document will be made a part of the record.

[The information referred to follows:]

The Washington Post

Fact Checker

Setting the record straight on a net neutrality fact check

By Michelle Ye Hee Lee March 25

In January, the Fact Checker was critical of claims by opponents of a then-pending Federal Communications Commission rule change on Internet regulation. The FCC had been considering changing its regulations to "reclassify" broadband providers as a public utility, like water, telephone or electricity. Proponents of this change said doing so would give equal access to the Internet, at no additional cost. Opponents argued it would pass on fees and taxes to consumers. The buzz term for this change is "net neutrality," and there is still a lot of debate over its potential impacts.

The Fact Checker awarded Three Pinocchios to widely-cited claims that the FCC reclassification would cost $15 billion a year in new taxes and fees. The figure originated from a December 2014 report by the left-leaning Progressive Policy Institute, which calculated the worst-case scenario of all possible local and state telecommunications fees and taxes that could be levied on Internet services. After the report was published, Congress renewed the Internet Tax Freedom Act (ITFA), which prohibits state and local governments from levying new taxes on Internet access. So researchers published an update with state and local telecom fees, and modified the figure to $11 billion. It was noted in a footnote of a follow-up an article and was not readily available to average readers not following the debate.

Since the fact check published, some net neutrality proponents misquoted it on social media, either attributing the Pinocchios to PPI or to the $11 billion figure. Most recently, FCC Chairman Tom Wheeler misused the fact check during a House Appropriations Committee budget hearing on March 24, 2015:

Rep. Kevin Yoder (R-K.S.): *I would just ask if the FCC could somehow calculate the increase in cost and fees — local, state and federal — that will be passed on to taxpayers and users, and to be able to pass that [calculation] on to the committee.*

FCC Commissioner Ajit Pai: *If I may, one independent study from the Progressive Policy Institute has put that figure at $11 billion per year.*

FCC Chairman Tom Wheeler*: And if I may, that specific one study was given Three Pinocchios by The Washington Post.*

Pai shook his head at Wheeler's comment, and rightfnlly so; Wheeler incorrectly cited The Fact Checker. Pai's answer is not entirely accurate, either, as PPI's $11 billion figure includes state and local telecom fees, not federal fees. The FCC has not yet announced how and whether federal fees would change.

"For our part, we maintain that the Open Internet rules do NOT raise taxes or fees, period. As you noted, the Internet Tax Freedom Act bans states and local taxes on broadband access regardless of how the FCC classifies it, so that prohibition has already been taken care of by Congress," FCC spokeswoman Kim Hart said.

This is the original Pinocchio Test from the Jan. 16, 2015, fact check:

> *It is impossible to quantify the exact impact of the potential FCC decision, since Internet regulation is a new area of policy. New taxes are prohibited as long as the Internet Tax Freedom Act is in effect, so it is inaccurate to say there would be $15 billion in new taxes. There may be state charges and fees, but there is no proof that all of the current fees on telephone services would apply again to Internet services. It will not add up to $15 billion, and likely not add up to $11 billion — the worst-case scenario. The researchers agree it is a "high-end" estimate, which was the purpose of the report.*
>
> *There 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. But the researchers did not calculate a low-end figure for the report. In addition, the modification from $15 billion to $11 billion is a 27 percent decrease, yet the change is buried in a footnote and not readily visible for the public.*
>
> *The more complex the issue, the easier it is for politicians to obfuscate the reality with dramatic numbers. On behalf of the average American consumer, we award Three Pinocchios to the use of the $15 billion figure.*

On Feb. 26, 2015, the FCC voted to reclassify Internet service. The cost impact remain to be seen. Some state and local government leaders may decide to levy fees, and the FCC may decide to extend federal fees. A recent calculation placed additional annual costs at $6.25 billion. We will continue to monitor the issue.

For now, however, we caution everyone commenting on net neutrality to check the facts, and beware of the myriad unknowns. The Fact Checker certainly does not appreciate being misquoted.

(**Update**: It was Pai's turn to incorrectly cite The Fact Checker, after this article was published. He said during a March 25, 2015, House Judiciary Committee hearing on the FCC's net neutrality rule:

***Pai**: The mere fact that they are now telecom providers, it means that the door is open for state and local entities to reclassify them as such. And if I could enter into the record, of Washington Post Fact Checker that just came out today, suggesting that the left leaning Progressive Policy Institute study indicating that $11 billion in state and local fees would be raised is in fact the case.*

The Fact Checker did not claim the $11 billion increase "is in fact the case." We concluded the opposite. (Scroll up a few paragraphs for exact The Pinocchio Test wording.)

Matthew Berry, Pai's spokesman, clarified Pai's comment: "The language 'is in fact the case' was intended to reference the fact that The Fact Checker's 3 Pinocchio rating didn't apply to the $11 billion figure as Chairman Wheeler had claimed at the prior day's hearing. Commissioner Pai didn't intend to claim that the Fact Checker had affirmatively endorsed the 11 billion figure. But he obviously wasu't clear iu the way he made his point and it therefore didn't come across the way he intended. He asked for the article to be entered in the record, which speaks for itself.")

(About our rating scale)

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For more Fact Checks on net neutrality:

Fact Checker: Will the FCC's net neutrality decision cost Americans $15 billion in new taxes? Nope

Michelle Ye Hee Lee reports for The Fact Checker. Send her statements to dig into via e-mail, Twitter or Facebook.

Mr. PAI. Secondly, in terms of the Federal taxes, in particular, the writing is on the wall. If you look at some of the promises the FCC has made in terms of the programs that are administered under the Universal Service Fund, last December, just to give you one example, the FCC decided to increase by $1.5 billion the amount of spending on the schools and libraries program. That money has to be funded from somewhere. It is going to be funded through Universal Service Fund contributions.

So the pressure to apply it to broadband is tremendous. And now the FCC having indicated that the door is open, I think we clearly know the consumers are going to be paying from the bottom line.

Mr. FORBES. Okay.

Chairman Wheeler, even if everyone who is participating here today could agree that blocking, throttling, and paid prioritization by Internet service providers is not good for innovation and not good for consumers, don't you think the Open Internet rule that was passed by the FCC on a party-line vote is one dimensional and does nothing to prevent other stakeholders from violating the same principles of protecting an open Internet, specifically making interconnection negotiations one-sided and anticompetitive for ISPs, therefore, hurting Internet users?

For example, on several occasions, edge providers have blocked Internet users from accessing their content on the Internet based off of their ISP.

Mr. WHEELER. Thank you for your question, Congressman. I think that it is equally bad when edge providers block content. The question is whether the Congress has given us authority to deal with that. What Congress did give us authority to deal with was when an ISP connects to the public Internet.

What we said in our order was that we would assert jurisdiction and be watching, that we would not assert regulation, which a lot of folks wanted us to do, we would not say we are going to do this or that, but that we would watch what was happening there. That goes to the concept that I think is at the core of what we are trying to do, which is how do you establish a set of basic concepts, which is the just and reasonable test which has stood the test of time and been well-established in the litigation, and have what I call a referee on the field, who can take a look at something and say, "Now does that fit with inside that kind of circumstance?"

I think that is in keeping with what was going on that Commissioner Pai referenced leading up to the Open Internet order, which was when various commissions were saying, "Here are the rules of the road. Here are the standards we want you to adhere to. And we are holding the sword of Damocles over your head that if you don't, we have the ability to do something."

The problem was that when the Verizon court made its decision, it took away the sword. And it put us in a position where we have to say, what is it that we are regulating, and what are the standards, and how are we going to continue—on the point you made, and the point Commissioner Pai made—making sure that we are watching that marketplace to make sure that the behavior there does not hurt consumers and does not hurt innovators.

Mr. FORBES. Commissioner Wright, I only have seconds left, but do you agree or disagree with Chairman Wheeler on that?

Mr. WRIGHT. With what portion of it?

Mr. FORBES. Well, whatever you can do in 30 seconds, I guess, because that is all I have—or Commissioner Pai, either one.

Mr. PAI. Congressman, I think your question targets exactly the reason why Title II regulation by the FCC is inferior to antitrust. The fact is that there is no evidence in the record of anticompetitive blocking sufficient to support industry-wide regulation.

To the contrary, the FCC is also, by focusing myopically solely on ISPs, ignoring other potential threats that could come from edge providers.

I provided the example in my written testimony of Meerkat, a very innovative live-stream application that, it argues and some have argued, has been crippled by Twitter refusing access to its social graph.

Those are the kinds of threats that antitrust is perfectly well-suited to examine, but the FCC simply isn't able to do it based on Title II.

Mr. FORBES. Thank you.

Mr. Chairman, I yield back.

Mr. GOODLATTE. I thank the gentleman.

The Chair recognizes the gentleman from New York, Mr. Nadler, for 5 minutes.

Mr. NADLER. Thank you, Mr. Chairman.

Along with President Obama and about 4 million other Americans, I urged the FCC to defend the principle of net neutrality and to reclassify broadband providers as common carriers under Title II of the law, in order to ensure that everyone has equal access to the Internet. Therefore, I am very pleased with the actions of the FCC. The FCC chairman, in particular, should be applauded for his actions and for his leadership.

The FCC has a vital role to play in protecting the virtuous cycle of innovation by preventing broadband providers from blocking, throttling, or offering paid prioritization. Providers should be common carriers, and must not block content; slow, or degrade the transmission of content; or extract higher fees for faster transmission of content.

The FCC must never allow for a pay-to-play Internet, where one company can refuse to allow fast access to another company unless they pay a premium. That could lead to anticompetitive behavior and the stifling of innovation.

What if a smaller competitor with a great idea cannot afford to pay an additional fee for access to the Internet's fast lane? Innovation would suffer and, ultimately, consumers would be harmed. Everyone deserves equal access at equal speeds.

I agree with the FCC chairman when he says that having an Open Internet and net neutrality is beneficial to consumers. I agree with the FCC chairman when he says he wants to prevent blocking. E.g., Comcast can't say no access to YouTube. I agree with the FCC chairman when he says he wants no discrimination. Comcast can't degrade Netflix in order to make Comcast's competing service look better. I use Comcast only as example, not an allegation.

The best way to ensure that these rules are strong and enforceable is to use the Title II common carrier authority. The FCC has

every right to do so and, in fact, was merely acting on the court's suggestion to reclassify broadband providers as common carriers.

In addition, antitrust law is not sufficient on its own to prevent big Internet providers from harming consumers. Antitrust law is important, but so is regulation, and the two should work hand-in-hand to protect consumers and promote competition.

We shouldn't have to wait until a monopoly starts beating up on consumers before the law steps in.

As Gene Kimmelman and Allen Grunes put it in an op-ed in The Hill, "The FTC is a bit more like a fire hose. It is there to put out a fire after it has started."

Well, we want to prevent forest fires, if you will, and we need the FCC there to help us at the front end.

Commissioner Wheeler, Commissioner Pai says that Title II regulation will reduce competition among broadband providers, and that it will harm consumers by limiting the kinds of pricing and data plans that smaller and upstart broadband providers can offer. What would you say to that?

Mr. WHEELER. Well, thank you very much, Mr. Nadler, for your comment.

And I think Commissioner Pai and I have different views of the world. He tends to see a world full of small ISPs and behemoth edge providers, when I think the reality is there are three behemoth ISPs, and thousands, tens of thousands of innovative edge providers, and two guys and dog in a garage who got a new idea that will be up tomorrow, thanks to the openness of the Internet.

The expectation a consumer should have should not be determined by the net revenue of the company they happen to do business with, which typically is the only choice they have to get high-speed broadband. But the rules should apply to everybody.

Mr. NADLER. Thank you. Now, some have alleged that President Obama directed the FCC to reclassify broadband providers under Title II. Some have alleged that White House staff had inappropriately ex parte communications with the FCC prior to the President's public call for reclassification and strong Open Internet rules.

What is your response to these two?

Mr. WHEELER. No, sir, there were no secret instructions from the White House as to what we should be doing.

Mr. NADLER. And no improper ex parte communications?

Mr. WHEELER. And no improper ex parte communications.

Mr. NADLER. Thank you.

Commissioner McSweeny, do you think it inconsistent that some of your fellow witnesses complain about the supposed uncertainty stemming from implementation of Internet conduct rules? That is, the rule prohibiting unreasonable interference or disadvantaging of users' Internet access or use of lawful content that is contained in the Open Internet order on the one hand, but then trumpet a piecemeal, case-by-case approach to protecting net neutrality using antitrust enforcement on the other?

Ms. MCSWEENY. Well, Mr. Nadler, as a consumer protection and competition enforcer, I strongly believe in both the role of enforcers, but I also believe in the role of regulators. That is why I think it isn't really a choice that we need to make, that the most ideal out-

come here would be to have both the FTC and, to the extent it is relevant, the Department of Justice undertaking their enforcement mission to protect consumers, and the FCC similarly using its authorities with an Open Internet rule to provide the same kind of protection.

Mr. NADLER. Thank you. My time has expired.

Mr. GOODLATTE. The Chair thanks the gentleman.

The Chair now recognizes the gentleman from Iowa, Mr. King, for 5 minutes.

Mr. KING. Thank you, Mr. Chairman.

I thank the witnesses for your testimony.

And I turn first to Mr. Pai. I am just wondering this. Let us just say that I have an Internet service provider, and he is doing all of these things that seem to be crossing some of the philosophy within the commission itself, and that would be slowing down some traffic and billing more for faster traffic, and some of those things.

What are my alternatives, if I have a fiber-optic landline that maybe comes through a municipal service provider? What can I do under the proposal that you have, which is let us not change it. Let us leave it, actually, the way it was. What are my alternatives?

Mr. PAI. Congressman, if any consumer is facing what they consider to be a consumer-unfriendly practice by their provider, they can always seek recourse from the Federal Trade Commission to the extent that there is anticompetitive conduct involved. The Department of Justice and Federal Trade Commission always have authority.

But I would argue that the best tonic to those kinds of problems is competition. Ranking Member Conyers put his finger on the issue. If you have sufficient choices, the issues of net neutrality vanish because there is no incentive, no ability whatsoever, to engage in that kind of conduct. You can simply switch.

And that is why Title II takes our eye off the ball by reducing competition, making it harder for smaller ISPs to enter the marketplace.

Mr. KING. Okay, so I might have one or two or more landline providers. I might have a satellite provider. I might have more than that. I have two or so satellite providers, and I could have a wireless provider. Is it possible that people out there have as many as five or six different options to choose from now if they are unhappy with the provider that they have?

Mr. PAI. It is, and I think one of the reasons why the American Internet economy is the envy of the world, is because we do have a multiplicity of providers in a lot of areas. Companies are spending billions of dollars to acquire spectrum, to deploy infrastructure.

What is needed now is for the FCC to remove some of the barriers to infrastructure investment, to essentially do what Google Fiber has done in Kansas City, but on a national level, to allow every American to benefit from the broadband revolution.

Mr. KING. Well, then who is this FCC rule trying to help? What is the object?

Mr. PAI. I am not sure what the object is, but I can tell you what the result is. The results will be simply less competition for the benefit of the American consumer.

Mr. KING. Could this be spawned from the idea that "it isn't fair" idea? It isn't fair that some people have more money than others. It isn't fair that some people can pay for a faster service than others. It isn't fair that everybody can't ride in first class.

Mr. PAI. One could very well make that argument.

And if I could respectfully disagree with the Chairman in his characterization of how I view the marketplace, just to give you one example, Google is worth more than Comcast, Verizon, and T-Mobile combined, so it is not as if we are dealing only with scrappy edge providers working out of their garages.

But, secondly, I think the reason why we see Wall Street and other people perhaps inflating the values of these dominant company stocks is precisely because they know that Title II regulation is going to squeeze a lot of these providers out of the marketplace. It is going to make it impossible for the wireless ISP, for the small cable company, for even the municipal broadband provider, to provide a competitive alternative.

Mr. KING. Let me try another thing here. I spent my life in the business world, and I would invest capital. And if the government came in to try to regulate that capital, I would invest it under the rules we had, but when the rules changed, then the value of my assets might be diminished if it is more difficult for me to extract profit out of those assets.

So is there any discussion on the commission about the rights to property that are being regulated into a diminished state of competitiveness? Was that part of the discussion?

Mr. PAI. I don't think that concern was addressed adequately. I think the fact that the rules are so broad and so vague makes it very unclear how people who are in the private sector who have to take that risk are going to be able to pull the trigger and make that investment decision.

Mr. KING. The expectation to be able to make a profit on your capital investment though, would it be your opinion that it is diminished with this rule?

Mr. PAI. I think it is diminished, and the question of whether it rises to the level of a regulatory taking for constitutional purposes is something that a court will have to sort out.

Mr. KING. Commissioner McSweeny, you have heard this dialogue. Do you have any comments on what might be rights to property, and the opportunity to get a return on investment, the comments that we have had in exchange?

Ms. MCSWEENY. Sure, I mean it is my understanding that the action the FCC is taking is based on an extensive record grounded in trying to protect the virtuous cycle of innovation that it assessed exists here.

When innovators create content, people want more broadband. When they want more broadband, more broadband gets built.

So I would suggest, from my perspective, the evidence I see in the marketplace is that mostly in America, two-thirds of Americans have a choice of one broadband provider, and they don't have a lot of competition on the local level for these kinds of services. Very often, they can also be locked into plans as well that have switching costs for them when they are making those choices.

So I think the evidence the FCC is acting on here is to protect that virtuous cycle of innovation and competition, and that the evidence is relatively well-established by an exhaustive record that has even been acknowledged by the D.C. Circuit.

Mr. KING. Thank you, Commissioner.

I thank the witnesses and yield back the balance of my time.

Mr. GOODLATTE. The Chair thanks the gentleman, and recognizes the gentleman from Michigan for a unanimous consent request.

Mr. CONYERS. Thank you. I have five letters, one of which is addressed to both of us, plus an article from The Hill, and I ask unanimous consent to enter them into the record, sir.

Mr. GOODLATTE. Without objection, they will be made a part of the record.**

Mr. GOODLATTE. And the Chair now recognizes the gentlewoman from California, Ms. Lofgren, for her questions.

Ms. LOFGREN. Thank you, Mr. Chairman.

As you know, I represent Silicon Valley here in the Congress, and I will say that the level of excitement and gratitude, Commissioner Wheeler, over the decision made by the FCC is immense. I brought this paper because the San Jose Mercury News is kind of the newspaper of record. Here it is, 2 days after the commission vote, "GOP, Valley Unable to Click." There is a picture of our colleague, Kevin McCarthy, and, "Republicans react harshly to tech line in the sand over protections for Internet."

I mean, other than SOPA, this is the biggest issue that has been before the tech community in a long, long time.

In the article, one of the founders of TechNet said this, "The GOP seems to think that Orwellian language is going to work on the world's smartest people. If you say net neutrality is government regulation, and if you think there is anyone in the Valley who thinks that is a true statement, you are already dead in the water. They would be better off just saying we disagree."

So I hope that this hearing is just more whistling in the wind, and I do believe that your very wise decision will prevail.

I have a couple of questions. The first is just for my enjoyment. I remember when SOPA was discussed here, and we had about 10 million phone calls and emails in half a day. How many Americans contacted the FCC to ask you to do this net neutrality rule that you did?

Mr. WHEELER. About 4 million people, Congresswoman.

Ms. LOFGREN. Very good. And has anything else generated that level of input recently?

Mr. WHEELER. It even broke the record of Janet Jackson's wardrobe malfunction.

Ms. LOFGREN. Wow. You know, in terms of Title II, I am interested in competition. As has been pointed out by Commissioner McSweeny, there isn't any in most of the country, in terms of broadband access.

How might your ruling actually help in the deployment of broadband? One of the issues that I am sort of intrigued by is that

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**Note: The submitted material is not printed in this hearing record but is on file with the Committee and can be accessed at:

http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=103236.

common carriers now have access to utility poles in ways that they did not before.

Just for one example, Google Fiber was looking at deployment in my town, and people are very eager because it is like 10 times faster than any other provider, but a big constraint is tearing up the streets, and they don't have access to the poles. But now, maybe they do.

Do you have an opinion on that?

Mr. WHEELER. Thank you, Congresswoman.

Yes, Commissioner Pai talked about pole attachments as an imaginary horrible. I think it is actually a leveling of the playing field and quite good news.

I happened to be involved in the cable industry when the Congress in 1978 said, "Hey, the telephone companies are keeping cable companies from getting on the poles, and we think cable companies ought to get on." As the cable companies then became dominant, they turned around and said, "Oh, the law says only cable, and so Google and other competitors can't get on." What we have done here is to level the playing field on that.

There is talk about that increasing rates. The reality is in our order we say, we are going to be watching, and if utilities start playing around with that, we are going to step in and it is not going to happen.

The point that you made is really important, however, and that is that every day we are seeing major ISPs step forward and say, "We are going to build new competitive high-speed broadband." It is not just Google that is out building.

Ms. LOFGREN. No, I wouldn't want it to be just them.

Mr. WHEELER. Exactly, it is not just them. It is over-building each other, and that is what we want to have. And the reason they are doing it is because there is no rate regulation, and we haven't affected their ability to get a return.

Ms. LOFGREN. Let me ask you this, in terms of municipal providers, does your rule affect them or are you taking other steps to allow municipalities that want to provide broadband as a utility to step forward?

Mr. WHEELER. Thank you. It does not specifically address them. In the same meeting, we did happen to rule on two petitions we had from Tennessee and North Carolina where municipal providers were asking us to preempt State laws that kept them from expanding.

Ms. LOFGREN. So there is some hope.

Let me just do, finally, the FTC Act does relate to common carriers, and Commissioner McSweeny recognized that a lot of things you do, the free speech issues and the like, have nothing to do with what she does. What do you think about amending the FTC statute so that the common-carrier carve-out was either diminished or eliminated? Would that make any sense?

Mr. WHEELER. Thank you, Congresswoman. I think that that is an idea that is definitely worthy of review. We have had great working relationships with the FTC. We work in tandem on many issues. As you point out, it is going to require legislation to resolve it.

We are trying to take steps in the interim and make sure that we have an MOU that says, "Here's how we are going to be working together." But I think the point you have raised is a very good one.

Ms. LOFGREN. Mr. Chairman, I would like to ask unanimous consent to place in the record, "GOP, Valley Unable to Click."

Mr. GOODLATTE. We would be happy to place that in the record.

[The information referred to follows:]

GOP, valley unable to click

Republicans react harshly to tech giants' ' line in the sand' over protections for Internet

Sunday, May 17, 2015 A1 By Josh Richman jrichman@mercurynews.com

Republicans have toiled for more than a decade to try to tap Silicon Valley's wealth and technical know- how, which Democrats have better leveraged to win everything from seats in state legislatures to the Oval Office.

But when Sen. Ted Cruz, R- Texas, recently called "net neutrality" — keeping Internet service providers from favoring some content over others —"Obamacare for the Internet," he was uttering what probably sounded like fighting words to valley giants such as Google, Facebook, Twitter, eBay and Netflix.

Many in the valley advocate a hands- off, libertarian approach to government regulation, but there's a widespread feeling here that government must act to keep huge telecommunications and cable companies such as AT& T and Comcast from messing with the Internet's unfettered gush of data that makes their businesses thrive.

So, by coming down firmly against the Federal Communications Commission's pro- net- neutral-

ity vote in late February, Cruz and other leading GOP politicians now may be burning some of the bridges the party has tried so hard to build — and Democrats are gleefully warming their hands by that fire.

In Silicon Valley, "net neutrality has taken on almost a religious fervor — it has become a line in the sand," said Larry Gerston, professor emeritus of political science at San Jose State.

"This is the heart of Twitter," the company said in a statement after the FCC's vote. "Without such net neutrality principles in place, some of today's most successful and widely known Internet companies might never have come into existence."

Gerston said he was surprised by the ferocity of the GOP opposition to the FCC decision.

"I don't know why Republicans would be so worked up over this," he added. "I don't see much of a payoff other than this philosophical, knee- jerk response to government going into places where it hasn't before. But for many Republicans, that will carry the day. That's their mantra."

The FCC's vote essentially puts the Internet under the same regulatory umbrella as telephones. The aim is to keep Internet service providers from slowing or blocking certain Web activ-

ity -- or creating paid "fast lanes."

Silicon Valley's House Democrats -- Mike Honda, Zoe Lofgren, Anna Eshoo and Jackie Speier -- all lauded the FCC's action. But among Republicans, the only split now seems to be between those who want to use their new majority in both houses of Congress to ram through a resolution decrying the FCC in the hopes of overriding the decision , and those who would prefer to enlist some Democrats to impose different, weaker rules.

Even House Majority Leader Kevin McCarthy, R- Bakersfield, a frequent visitor to Silicon Valley and arguably the GOP's point man for the region, blasted the FCC vote.

"The FCC has just taken the Internet -- arguably the most dynamic contributor to a growing economy and higher quality of life in the world -- back in time to the era of landlines," he said in a statement after the vote. "The Internet is too important to the everyday lives of Americans for such government overreach."

The Silicon Valley Leadership Group , an influential lobbying and public policy organization , was delighted when McCarthy became majority leader in 2014. The group praised him for his stances on issues such as patent reform and changes in immigration law to increase the number of highly skilled workers.

But now the best reaction the GOP might hope for in Silicon Valley on the net neutrality issue is an awkward silence.

Members of the leadership group include Internet giants such as Google and Netflix but also service providers including Comcast, AT& T and Verizon. So the group has understandably taken no position on net neutrality. "It's not part of our public policy work plan," spokesman Steve Wright said.

Derek Khanna, a conservative commentator on technology, said that not all Internet companies agree on how best to achieve net neutrality , and some Republicans see the need for new rules. But harsh rhetoric from Republicans such as Cruz doesn't pave the way to finding common ground, he acknowledged.

"Republicans have failed to provide an agenda that appeals to Silicon Valley, and that's a longer- term issue for them going forward," said Khanna, a former House GOP aide and adviser to Mitt Romney's presidential campaigns who is now a fellow at Yale Law School's Information Society Project.

"There needs to be a real robust push on technology in order to be taken seriously," he said.

He suggested that the GOP tackle the lack of broadband competition in much of the country, since many customers have only one or two providers to choose from and thus suffer high prices and spotty service.

"That's fertile ground for Republicans to engage in" because the situation is the result of decadesold regulations and laws, he said. "We're awaiting a smart Republican to jump in on that issue."

But that, Khanna added, requires both bucking the telecommunications lobby and becoming

fluent in Internet issues.

Silicon Valley's Democratic activists, meanwhile, are watching how the net neutrality issue is playing out with delight.

"The GOP seems to think that Orwellian language is going to work on the world's smartest people," said Wade Randlett, a Democratic co- founder of TechNet, the valley's bipartisan political action committee. "If you say net neutrality is government regulation — and if you think there's anyone in the valley who thinks that's a true statement — you're already dead in the water. They would be better off just saying, ' We respectfully disagree.' "

"Republicans have failed to provide an agenda that appeals to Silicon Valley, and that's a longer-term issue for them going forward." — Derek Khanna, former House GO Paide and Mitt Romney adviser

Mr. GOODLATTE. The Chair recognizes the gentleman from Texas, Mr. Poe, for 5 minutes.

Mr. POE. I thank the Chairman.

I thank you all for being here.

Mr. Pai, let me start with you, and I have the same questions for everybody, but let me see if I can get through all the questions. What country has the best Internet service?

Mr. PAI. The United States.

Mr. POE. If we implement the rule that you all have agreed to, the statement has been made that the Europeans, who are our competitor, would be glad because it would diminish our quality down to their quality. Is that a fair statement or not?

Mr. PAI. I do think the playing field will be leveled in the sense that America's broadband marketplace will become less competitive, and Europe is actively trying to get rid of some of their utility style regulation to make themselves more competitive.

Mr. POE. This 300-page regulation doesn't mention any specific examples of abuse. Is there a reason for that?

Mr. PAI. I think the reason is because there is no industry-wide evidence of abuse. There are isolated examples from 8 years ago, from 10 years ago. But one would expect a broken Internet to offer up a plethora of current contemporary examples.

Mr. POE. This is implemented. How much is it going to cost, counting all the lawyers, all the regulators, all the people viewing the Internet? How much is this going to cost taxpayers?

Mr. PAI. The answer is unknowable, and that is because the application of the rules, is unknowable. I think it is telling, for example, with respect to the Internet conduct standard, that the FCC on the very date it adopted this standard, said, and I quote, "We don't know where things go next." The recipe for regulatory uncertainty is there to see.

Mr. POE. That is based upon the concept of the general conduct rule, is that what you are talking about?

Mr. PAI. That is correct.

Mr. POE. Basically, if I quote the Chairman correctly, we don't know what that general conduct rule really means.

Mr. PAI. I think that is exactly the problem innovators and entrepreneurs are going to face. We are essentially going to be funneling their entrepreneurial spirit through a regulatory bottleneck.

Mr. POE. Okay, general conduct rule—no, sir, I am asking questions. You will get your turn in a minute.

The general conduct rule is meaning that, basically, the FCC is going to determine what is fair, as far as Internet service access. Is that a good word to use, what is fair?

Mr. PAI. Essentially, that is the standard because the agency lays out seven vaguely worded standards, says it is nonexhaustive, doesn't give you any indication of how it is going to be applied, and explicitly tees up what appear to be pro-consumer options, such as T-Mobile's Music Freedom, that are on the chopping block.

Mr. POE. You know, fair means different things to different folks. I was a judge in Houston a long time, and I heard that word a lot. It meant different things to whoever you were asking the question about, whether something is fair. That troubles me in a report starting new regulations that we don't really—the government, God

bless us, the government is going to decide what is fair. That concerns me, just as a comment.

What countries have the greatest control over their Internet's system?

Mr. PAI. Certainly, I think some countries like North Korea, Cuba, and countries like that I think exercise a fair degree of control.

Mr. POE. How about China? Do they control their Internet?

Mr. PAI. They do, and they actively block a lot of applications and services.

Mr. POE. Do the Russians? Does tsar Putin control his Internet? I am sorry, President Putin, control the Internet in Russia?

Mr. PAI. I have heard instances of the Russian Government.

Mr. POE. Do they control who has access to the Internet?

Mr. PAI. I am not clear to what extent.

Mr. POE. If you know.

Mr. PAI. On that particular question, I am not sure.

Mr. POE. Will Internet speed, for those of us who use the Internet, will it increase or will it decrease if the FCC implements this 300-page rule?

Mr. PAI. I believe it will decrease.

Mr. POE. Why?

Mr. PAI. Because it will dis-incentivize companies from making the major investment decisions they have to make. It will impede them from deploying the infrastructure that carries some of this high bandwidth traffic, and especially to the extent that consumers are using bandwidth-hungry applications, it is going to make it more difficult for those applications to be delivered.

Mr. POE. FCC doesn't control content of Internet, does it not?

Mr. PAI. It does not, thankfully.

Mr. POE. I agree with that. Thankfully, it does not.

It concerns me that we may get to a point where the FCC decides in the name of fairness to control content, which I think is a constitutional violation.

Let me ask you this, does a rule that is implemented and proposed, how do we get there? I see there is a conflict in statements. Were you told, or the commission told by the Administration, impose this, let FCC control net neutrality.

Mr. PAI. Well, I think the President's statement on November 10, if you go to the White House Web site, it says, "This is my plan, and I am asking the FCC to implement it." That is a pretty direct statement.

Mr. POE. Was that before or after you implemented the plan?

Mr. PAI. That was before we implemented the plan, but well after we adopted the proposal in May of 2014.

Mr. POE. I have the same question for the other three, and I will put these in writing so you all can answer them in writing.

You think the plan will diminish competition? Is that what you said?

Mr. PAI. I do.

Mr. POE. Okay. Thank you, Mr. Chairman, for your patience. I will have the same questions, if I may, for the other three in writing.

Mr. GOODLATTE. We will ask that they respond to them in writing.

The Chair now recognizes the gentlewoman from Texas, Ms. Jackson Lee, for 5 minutes.

Ms. JACKSON LEE. Mr. Chairman, thank you, to the Ranking Member as well.

It looks like a journey that we travelled some years ago. If you are on this Committee long enough, you will see some circular returns as we looked at dealing with some other, if you will, communication entities on another journey that we took some years ago dealing with how we would best serve the American public.

Frankly, to the witnesses, I believe that this is what this discussion is about. They are our bosses, and this is about serving the American public.

So I would like to ask Chairman Wheeler and Ms. McSweeny to help me walk through this journey. I am looking at some questions that I asked. We are trying to track the date, either 2010 or 2011, and I assume it is public record. I can say that it was a witness by the name of Ms. Sohn, and we went through a journey dealing with issues of competition and what would best suit the consumer. The last answer indicated it would be anticompetitive.

So, Chairman Wheeler, let me ask you the question, on net neutrality, where would it be on the scale of competitiveness or anticompetitiveness?

Mr. WHEELER. Thank you, Congresswoman. It is a procompetitive activity, and at its core is the fact that it is not old-style utility regulation. It does not regulate rates, does not have tariffs, does not have unbundling.

Let me give you a couple of examples of that. Here's a Wall Street analyst's report. He says, we think the path to retail rate regulation is so difficult that it is close to inconceivable.

Now people keep talking about these imaginary horribles about there could be rate regulation in these unique circumstances.

Ms. JACKSON LEE. If I may stop you for a moment, I am going to let you finish. So in essence, net neutrality could provide a profit on both ends, those who access it and those who own the highway? Am I correct?

Mr. WHEELER. Thank you for putting it that way. Yes, ma'am, because the goal here is how do we make sure that we have consumer protections and protections for those innovators in place and, at the same point in time, create incentives for the build-out of capacity and the competitive build-out for capacity.

If you look at what is been going on, as I was saying before, when people knew that we were headed toward Title II, they are still building. The stocks are up. The analysts are saying there is not going to be these things pulling back.

There was huge bidding in the AWS-3 spectrum auction, setting all kinds of records, about three times what we expected we would make, despite the fact that people knew they were going to be covered under Title II of the act.

So, yes, this has been designed to make sure that carriers are allowed to charge the rates they need to justify the investment to build competitive and ever-faster broadband.

Ms. JACKSON LEE. But all those who have modeled their life, maybe the new Millennials, maybe the Generation X and beyond, after the likes of founders of the various techs that are out in California, per se, or in Austin, Texas, they all still have an opportunity. They can wake up one morning in a college dorm and have a brilliant idea and pursue it under this net neutrality.

If I might get Ms. McSweeny, and I would like to come back to you, Chairman, in my short time.

Commissioner McSweeny, if you would, answer the same question about competitiveness. But I then want both of you to follow up on the idea of how this differs from the garden variety enforcement of utilities. People are fearful that we are going to pounce down on them in an opposite way, which is net neutrality. They won't have any assistance from us.

But, if you could, on the idea of competitiveness, very important. Consumers having access. The highway being in top shape.

Ms. MCSWEENY. Yes, Congresswoman, and to your point, also the innovators. I would say it is virtuous on both ends of that cycle. So the edge providers, those students you referred to in Austin that have this great idea, having clear rules that provide them access is very important to making sure that that innovation pipeline remains open and available to people.

So yes, I would say that that is part of why this Open Internet order is very important to maintaining the Open Internet.

Ms. JACKSON LEE. Commissioner Chairman, did you want to just get back on enforcement?

Mr. WHEELER. There are 48 sections of Title II, and we have forborne from 27 of those, saying those are the old rules, those are what you did in the monopoly era, those are what you did when you were treating this as a utility. We have patterned it on the model that has worked so well for the last 22 years for the wireless industry.

Interestingly enough, the wireless industry asked to be regulated under Title II, and to have old rules forborne, and the commission forbeared, forborne—whatever the word is—from 19 of the sections. We did it for 27 sections, so we are actually 50 percent more deregulatory than the wireless industry has had for the last 22 years and been wildly successful.

Mr. GOODLATTE. Time of the gentlewoman has expired.

Ms. JACKSON LEE. Thank you, Chairman. Thank you.

Mr. GOODLATTE. The gentleman from Pennsylvania, Mr. Marino, is recognized for 5 minutes.

Mr. MARINO. Thank you, Chairman.

Welcome, panel members.

Commissioner Wright, it appears that the FCC's Open Internet order will prohibit smaller rival companies to compete with large companies. What say you about that?

Mr. WRIGHT. I think Commissioner Pai articulated this concern in a way that is consistent with my understanding a little bit earlier. I think he is correct that there is substantial risk that raising the cost of smaller rivals to compete, and thus entrenching existing monopoly power to this extent, is a real concern to be worried about under this order.

Mr. MARINO. The way I understand antitrust laws is they protect one's ability for free competition. Is that the main idea behind antitrust law?

Mr. WRIGHT. Yes.

Mr. MARINO. The FCC, again, Mr. Wright, the FCC has asserts that it can protect consumers and their privacy. Yet the FTC, and not the FCC, has a longstanding history of prosecuting this type of conduct. How many cases has the FTC prosecuted?

Mr. WRIGHT. If we are talking about both consumer protection cases in this space as well, I don't have an exact number, but we have been around prosecuting these cases for a long time.

Mr. MARINO. Do you know how many the FCC has pursued?

Mr. WRIGHT. I do not.

Mr. MARINO. Okay.

Ms. McSweeny, do you know how many the FCC has pursued?

Ms. MCSWEENY. No, sir, I don't.

Mr. MARINO. Okay. Well, my research shows me that the FCC has pursued two.

Commissioner Pai, what do you have to say about the FCC's ability and experience with consumer privacy investigations and litigation, relative to the FTC?

Mr. PAI. Congressman, that is a great question. Thank you for it.

Our experience, as you pointed out in your colloquy with our FTC counterparts, is extremely limited because the FCC, until reclassification, simply didn't have that much authority in this space, in the broadband space.

Mr. MARINO. Mr. Pai, again, what happens with the fines, the money, that the FCC collects? Do you know what happens with that money, where it goes?

Mr. PAI. My understanding is that those fines are deposited in the United States Treasury.

Mr. MARINO. What happens with the fines and the money that the FTC collects?

Mr. PAI. I would defer to my FTC colleagues on that.

Mr. WRIGHT. They go back to consumers.

Mr. MARINO. Okay. Do we all agree that—and if you don't agree, raise your hand—that that money should be going back to the consumers and not into the Treasury?

You don't agree, Chairman?

Mr. WHEELER. I think that the answer to the FTC question is that it is both, and we have participated in some recent settlements with the FTC that have just done that. Some actually also goes back to States because we have done it collectively.

Mr. MARINO. Are you saying the FCC money goes to States and consumers? The FCC money, not the FTC.

Mr. WHEELER. No, I am saying the FTC, we work together with the FTC, and in things that we have done together, it has been States, Federal Government, and consumers.

Mr. MARINO. But they have been initiated by the FTC, not the FCC. If you have a fine, where does it go? If the FCC has a fine——

Mr. WHEELER. No, ours go to the Treasury.

Mr. MARINO. Okay, I think it is better off going back to the consumer, my personal opinion.

Mr. WHEELER. Sir, could I correct one thing on the privacy question?

Mr. MARINO. Quickly, because I don't have much time.

Mr. WHEELER. I think the two privacy actions you were talking about are in the last 6 months. We have had decades of CPNI, Customer Proprietary Network Information, rules and enforcement against that to protect what people watch, what people dial.

Mr. MARINO. Sir, I understand where you are going with that, but that is complete and distinct from the prosecution end of things. I am a prosecutor. I know these things. I have done these things. That is distinct of that.

Mr. WHEELER. It is more than two. Those are the basics.

Mr. MARINO. Ms. McSweeny, for decades the FTC has used antitrust laws to protect against anticompetitive actions in a wide range of industries. Do you agree with me on that?

Ms. MCSWEENY. Yes, sir.

Mr. MARINO. Why do you believe, or perhaps you don't believe, the FTC is ill-equipped to prosecute anticompetitive conduct on the Internet?

Ms. MCSWEENY. Sir, I believe the FTC is well-equipped to prosecute it. My point is that I think consumers are better off, and entrepreneurs are better off, when there are clear rules in the Open Internet order, and also the FTC on the beat to protect consumers and to protect competition.

Mr. MARINO. Yes, but why do we need two forms of government for doing something like this? The government is big enough at this point. We don't need duplicative services.

I am colorblind, sir. Has my time run out?

Mr. GOODLATTE. We will allow the witness to answer your question.

Mr. MARINO. Yes, please.

Ms. MCSWEENY. Thank you.

I mean, I would say that you are correctly pointing out that there are slightly different tools in the FTC toolbox than there are in the FCC toolbox. From my perspective as a Federal Trade Commissioner, I think the FTC tools are providing consumer redress, and the fact that we are not limited by a 1-year statute of limitation, are very good tools for protecting consumers, which is why support repealing the common carrier exemption in the Federal Trade Commission Act.

Mr. MARINO. Thank you.

Mr. GOODLATTE. It would be a good question how that matches up with the Supreme Court's decision in the Trinko case, but we will now recognize the gentleman from Georgia for his questioning.

Mr. JOHNSON. Thank you, Mr. Chairman.

Commissioner Pai, you do agree that open debate is healthy and that elected leaders should take sides on important issues so that voters can hold them accountable?

Mr. PAI. Absolutely.

Mr. JOHNSON. And public statements by the White House on the important subject of net neutrality were appropriate, were they not?

Mr. PAI. I think that any citizen of the United States can weigh in, and the President is a citizen of the United States, like any other.

Mr. JOHNSON. In fact, it was his comments that contributed to the more than 4 million public comments that were ginned up, and that the FCC was able to peruse and consider in its rulemaking process. Isn't that correct?

Mr. PAI. Well, the President's comments postdated the bulk of those comments. The agency was considering a very different proposal when the President made his announcement on November 10.

Mr. JOHNSON. Well, my question was, though, that his comments contributed to the volume of in excess of 4 million comments that were actually received by the agency in the rulemaking process. Isn't that correct?

Mr. PAI. My understanding is the vast majority of the comments came before the President's announcement.

Mr. JOHNSON. Well, there were some though. Come on, give the President some credit. Can't you do that? And if you can't, I understand.

Well, now, it is a fact that under the past four Administrations, both Republican and Democratic presidents, that they have publicly participated in the FCC rulemaking process. Isn't that a fact?

Mr. PAI. I am not aware of anything on the level of the November 10 announcement.

Mr. JOHNSON. Well, let me ask Chairman Wheeler, are you aware of that, sir?

Mr. WHEELER. Yes, sir.

Mr. JOHNSON. Certainly, there is nothing wrong with that, is there, Mr. Pai?

Mr. PAI. Well, I think the concern comes when the agency is proposing X and the President instructs the agency to do Y and the agency does Y. I think that is a concern.

Mr. JOHNSON. Well, you are kind of getting warm a little bit now.

So the President publicly commented, which you say it is okay, he should do as a public official, and that actually helped to gin up more public comment, and others have done it in the past, other Presidents have done it in the past.

Now, FCC rules, there are some exemptions that allow for ex parte communications between the FCC and other Federal agencies during the rulemaking process. That is correct, isn't it?

Mr. PAI. That is correct, sir.

Mr. JOHNSON. And the White House is also exempted.

Mr. PAI. I can't recall whether the exemption covers other Cabinet departments, or whether it also includes the White House, the Executive Office of the President, but there is an avenue for White House participation.

Mr. JOHNSON. Let me ask you this question, you have no evidence to refute the assertion that Chairman Wheeler made during this hearing that there had been no ex parte communications between the FCC and the White House on this particular issue during the rulemaking process. Is that correct?

Mr. PAI. I have no personal knowledge of any consultations.

Mr. WHEELER. Mr. Johnson, if I can do one clarification, there was an ex parte when Jeff Zients, an adviser to the President, came to see me to say the President was going to have an announcement and take a position. There was an ex parte filed on that.

Mr. JOHNSON. I see, okay.

Well, other than that, Mr. Pai, do you know of any evidence that supports the Republican charge or allegation that the President strong-armed the FCC in some way to issue the order that we are concerned with here today? Do you have any information or any evidence that you can share with us?

Mr. PAI. Congressman, I know various congressional Committees are looking at that. I am solely looking at what the President actually said publicly.

Mr. JOHNSON. You don't know of any evidence that the President has exerted any undue influence on the decision-making process. Is that correct?

Mr. PAI. Other than the public statements that the President made, I am not aware of any.

Mr. JOHNSON. Which was something that Presidents do, and it was entirely proper, I think you have already stated.

Mr. PAI. Well, Congressman, as a former staffer under Republican and Democratic administrations, I cherish the agency's independence, and my concern comes when a political actor of any party instructs the agency as to what to do and even the legal theory that it is supposed to use.

Mr. JOHNSON. Well, sir, you can't have it both ways, now.

Mr. GOODLATTE. Time of the gentleman has expired.

The Chair recognizes gentleman from Georgia, Mr. Collins, for his questions.

Mr. COLLINS. Thank you, Mr. Chairman. I appreciate it.

Chairman Wheeler, thanks to you and the rest of this panel today. I appreciate you coming forward and discussing this reclassification on the commercial Internet as Title II, but I think even in light of the last questioning and line of questioning, and I want to go over a timeline, which I think may put this in perspective, because I have always operated off the perception in life, and I think it is true, that perception is reality. And that may not be the truth, but perception is reality, and it clouds most of what we do.

So then going over the timeline, Mr. Wheeler, you had stated on February 19 in 2014 in response to the D.C. Court of Appeals ruling of *Verizon v. FCC* rejecting your assumption of authority to regulate the Internet, the FCC would accept the D.C. Court's invitation by proposing rules that will meet the court's test for preventing improper blocking of and discrimination among Internet traffic.

Nearly 2 months later, you formally proposed the Chairman's draft of proposed rulemaking to your fellow commissioners. Notably, this draft did not propose to reclassify broadband under Title II.

Then on May 14, 2014, the FCC's NPRM containing consideration of Title II reclassification passed by vote of 3-to-2.

In the months that followed, things got really interesting. On November 10, 2014, President Obama publicly stated what he be-

lieved the FCC and independent agencies should do: reclassify consumer broadband under Title II of the Telecommunications Act.

The day after the FCC vote, President Obama sent a thank you note to Reddit users for their advocacy for Title II reclassification. And the next day, Politico reported that DNC sent out an email stating the FCC approved President Obama's plan.

As an independent agency—again, perception takes hold—you are under the highest scrutiny to act in a manner completely free from political influence and executive branch pressure. I am very concerned that this has been a failure.

Legally, it appears the executive branch may have legislated de facto through your agency and is now implementing its policy, and you have allowed the credibility of the agency to suffer because of it.

When the many lawsuits come, and I do not believe you will enjoy the presumption of the Chevron defense, and ultimately your flawed theory justifying this expansion will be struck down rightly.

In the *Utility Air Regulatory Group v. EPA*, the Court made it clear that an agency must be grounded in the statute, which I do not believe you are, and the agency has no power to tailor legislation to bureaucratic policy goals to regulating ways unrecognizable to Congress that designed it, which in this case I believe you truly are.

Now, Mr. Wheeler, I don't know if you want to be a Member of Congress. It is not a fun process to get here. But if that is what you want to do, then you know, find your application, run, spend a million, let your world know who you are, and come on and join us and legislate, because one of the things that you said earlier was that Congress, several legislators have put forward ideas in legislation to deal with this.

Again, many of us do believe there is an Article I issue here, and that your role has been overstepped in this by doing what you are doing. You have applied the most antiquated regulatory framework to an area where innovation and growth have thrived. We cannot regulate our way to better innovation here. And we also can't do that by circumventing Congress to do so.

So in light of that, let me go to Mr. Pai.

Mr. Wheeler, if you want to jump in, that is fine. We don't have a lot of time.

Basically, the order touts the FCC's substantial experience over the past decade on last-mile issues, but admits that the agency lacks similar depth in the Internet traffic exchange. The net neutrality order represents—and I am skipping here just a second—but, the net neutrality order represents a massive expansion of the commission's role and is a precursor to a larger, more costly bureaucracy overseeing and regulating Internet from the top to bottom.

I want to know a comment how this monster that you have unleashed is going to be kept in check.

Mr. Pai, and then just briefly Mr. Wheeler.

Mr. PAI. Congressman, there is no question that before February 26, the FCC did not exert jurisdiction over Internet interconnection. After February 26, it does.

Before February 26, the FCC didn't purport to have jurisdiction over such things as wireless service plans. After February 26, it does.

Before February 26, the FCC had no arguable role in rate regulation. After February 26, there is ex post rate regulation, as we agreed last week.

Mr. COLLINS. Mr. Wheeler, just a question here, do you all have a lot of free time over at the FCC? I mean, a lot of free people sitting around doing nothing to take on such an expansion?

Mr. WHEELER. Congressman, thank you for the question.

In 1996, the Congress changed the rules and said we want you to look both in terms of telecommunication services and information services. A telecommunication service is defined as a service that hauls an information service. When the commission first looked at the question of were these ISPs telecommunication services or information services, it was an entirely different world back in 2002.

Mr. COLLINS. I am going to stop right there. I am going to reclaim my time for a second, because I think that is the heart of what we are dealing with here, is what was dealt with at that time, that is a congressional decision. That is something that should be debated in the halls of Congress, not in an executive agency.

Mr. WHEELER. I am sorry, I wasn't making myself clear. I am sorry.

Mr. COLLINS. I think that is the whole problem with this. It is not clear.

Mr. WHEELER. Congress said to us to make the decision about whether it is a telecommunication service or an information service. In 2002, there were about a million Web sites, and what ISPs were doing was providing information services. Today, there are 1.25 billion Web sites, and what ISPs are doing is hauling traffic, not providing information services.

So what we were doing was saying Congress said to us, "These are the rules you should look at," and we looked at that, and we saw that in the intervening time, the activities of those regulated had changed substantially from one class to the other.

Mr. GOODLATTE. Time of the gentleman has expired.

Mr. COLLINS. I yield back.

Mr. JOHNSON. Mr. Chairman, I have a unanimous consent request.

Mr. GOODLATTE. Gentleman will state his unanimous consent request.

Mr. JOHNSON. To insert an op-ed entitled, "Why Presidents Advise the FCC" by Harold Feld and Kate Forscey; another publication entitled, "It Is Common and Legal Practice for the President to Weigh In on FCC Policymaking" by Public Knowledge; and last, an article published by the Washington Post entitled, "Will the FCC's Net Neutrality Decision Cost Americans $15 Billion in New Taxes? Nope," for the record.

Mr. GOODLATTE. Without objection, they will be made a part of the record, and I am sure they will be excellent reading.

[The information referred to follows:]

THE HILL

February 25, 2015 11:00 am

Why presidents advise the FCC

By Harold Feld and Kate Forscey

Despite millions of Americans asking the Federal Communications Commission to reclassify broadband as a Title II service, Congress has announced investigations into whether President Obama improperly influenced the FCC's Open Internet Rules proceeding. This has raised the question of the legality and history of presidents weighing in on the policies of independent agencies, like the FCC. An examination reveals that it is not only legal, but also common for an administration to comment on independent agency rulemakings. In fact, **presidents have been doing so for decades**.

The term "independent agency" is a specific legal designation. Put simply, it means that the president cannot fire the agency's commissioners. The term does not, as some pundits would have you believe, prevent the president that appointed the commissioners from meeting or conversing with them. Instead, "independent" simply serves to contrast with other departments where heads of agencies serve "at the pleasure of the president" and can be dismissed for failing to follow the administration's directives. Presidents may appoint new independent commissioners or designate a different chair, but those decisions still require Senate confirmation. This independent structure enables balance – it insulates the agency from the political process while maintaining accountability.

Independent agencies are typically created to address subject areas where there is a need for nuanced expertise and a risk of agency politicization. Congress created the FCC to be the expert agency on communications networks because the field requires technical knowledge. Additionally, Congress did not want any president directly regulating broadcasters to influence political coverage, and therefore designated the FCC to use its expertise to protect the public interest as industry dynamics change.

Presidents are still free to weigh in on an issue, and the Commission is free to take that into account – or not. There are strong reasons why an administration might comment on agency decisions. A president may feel the need to directly advise the FCC because communications is a critical component of our national economy, security and civic discourse. Additionally, a president may make statements to share a position with the public. The 1990s and 2000s saw many attempts by Presidents Clinton and Bush to weigh in on FCC action, with mixed results. Ultimately, the president has the same right to make public statements or have private communications with the FCC as any member of the public.

Even if the president weighs in on an issue and an agency wants to follow the president's advice, it cannot do so without proper justification, including developing a robust record demonstrating that it has examined the matter, addressed all objections, and provided a rational basis for adopting or repealing new rules. The rules will be reversed if a reviewing court finds the FCC failed to justify them or develop a sufficient record, as when the Bush Administration pushed the FCC to deregulate media ownership. A court reversed this decision because the FCC failed to justify its actions.

It's clear that any congressional investigation into Obama's net neutrality "plan" misses the point. The president's statements merely echo the sentiment of 4 million Americans who told the FCC that they value real net neutrality.

It is well-known that between the Chairman's initial net neutrality proposal in May 2014 and the early fall, the Commission accumulated an unprecedented amount of input for the record in the Open Internet docket. Reports indicated that the Chairman's position shifted significantly towards Title II reclassification during this time. Chairman Wheeler was reportedly deciding between a "hybrid" Title II model and full reclassification even before the president's remarks – marking a dramatic shift from his initial proposal. By the time Obama publicly voiced support for Title II, the question at the FCC was no longer *whether* to adopt Title II, but instead to *what degree*.

Obama's net neutrality statement prioritized three important features: reclassifying broadband as a Title II service, banning paid prioritization, and extending the rules to wireless Internet. The Republican draft legislation claimed to achieve the same goals. That Wheeler's proposal shares the same elements is hardly surprising.

It doesn't matter if you view the president's statement as a high-level endorsement or the final push Chairman Wheeler needed to embrace strong net neutrality rules. The bottom line is that it was neither "undue influence" nor illegal for Obama to publicly state his position to the FCC. Presidents have been doing so **for more than 30 years**, and this hasn't risked the agency's independence yet.

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Public Knowledge

IT IS A COMMON AND LEGAL PRACTICE FOR THE PRESIDENT TO WEIGH IN ON FCC POLICYMAKING.

Congress recently announced investigations into whether the President improperly influenced the FCC's decision in Open Internet Rules proceeding. This has raised the question of the legality and history of Presidents and their administrations weighing in on the policies of independent agencies, like the FCC.

"Independent agency" simply means the president cannot fire the commissioners, not that he may not meet or converse with them.

Independent agencies are commissions typically made up of members from both parties, with the president's party in majority. The President appoints commissioners and designates the Chair, but a President cannot fire a commissioner even when their policies run counter to the President's wishes. This is in contrast with other departments where heads of agencies serve "at the pleasure of the president," and can be dismissed by him if they do not follow his directives. Presidents may appoint new commissioners or designate a different chair, but those decisions still require confirmation by the Senate. The independent structure provides for insulation from the political process while retaining general political accountability.

The Commission may take the administration's views into account, but is by no means obligated to follow those views.

Independent agencies typically are created to address subject areas where there is a particular need for nuanced expertise and reasons to worry about politicizing the agency. The FCC, for example, is the expert agency on communications networks, which often requires technical knowledge of discrete issues. In addition, Congress did not want the President directly regulating broadcasters so as to influence political coverage. Congress created the FCC for this role to utilize its expertise and protect the public interest as industry dynamics change.

Presidents are still free to weigh in on an issue, and the Commission is free to take that into account - or not. The 1990s and 2000s saw many attempts by Presidents Clinton and Bush to weigh in on FCC action - their success rate was mediocre.

There are strong reasons why an administration might weigh in on agency decisions. Because communications is a critical component of our national economy, national security, and civic discourse, the President will feel the need to weigh in directly, rather than relying on the usual channels of having the National Telecommunications Information Administration (NTIA) or Department of Justice (DoJ) file comments. Additionally, the President may make public statements to inform the public of his official position.

Ultimately, the President has the same right to make public statements or have private communications with the FCC as any member of the public. As long as the President files the appropriate notice (called an *ex parte*) after a private conversation, there is nothing illegal or inappropriate. Of course, since the President is not just *any* private citizen, and his words will

carry considerable weight, Presidents make such direct communications only rarely, and generally only on matters of significant national importance.

There are constraints on the agency that prevent them from changing course just because the president wants to.

Even if the agency *does* want to follow the president's wishes, it may not do so absent proper justification. The agency must follow the guidelines of the Administrative Procedures Act, including cultivating an appropriately robust record to demonstrate that it has thoroughly examined the matter, addressed all objections, and provided a rational basis for adopting or repealing the new rules. If a reviewing court finds the FCC did not adequately justify the rules, or lacked a sufficient record, the court will reverse the rules. Example: when the FCC was pushed by the Bush administration to deregulate media ownership to close the record in the face of mounting public opposition, the court reversed the decisions - not because the president had inappropriately interfered, but because the FCC did not adequately justify its decision.

President Obama's statements on net neutrality and Title II merely reflected the sentiment of 4 million Americans and provided no new "plan" or details.

It is well-known that between the Chairman's initial net neutrality proposal in May 2014 and the early fall, the Commission accumulated an unprecedented amount of input for the record on the open internet docket. Reports indicated that the Chairman's position shifted significantly towards Title II reclassification during that time. Even before the President's remarks, Chairman Wheeler was reportedly deciding between a "hybrid" Title II or full reclassification – a dramatic shift from his initial proposal and extremely close to the final decision Wheeler announced in February. By the time President Obama publicly voiced his own support of Title II, the question at the FCC was no longer *whether* to adopt Title II, but instead to what degree.

Additionally, the President's two-minute public address on YouTube simply endorsed the views expressed by nearly 4 million Americans. It also exaggerates to call what the President proposed a "plan." It listed three important features: classifying broadband as Title II, banning paid prioritization and other forms of discrimination, and applying the same rules to wireless and wireline. The Republican "plan" in the form of the draft legislation claimed to achieve the same goals as the President's plan. That Wheeler's plan includes the same general elements is therefore hardly a surprise.

The bottom line is that whether the President's statement was a high level endorsement on a matter of critical national policy, similar to other public statements made by other Presidents over the last 30 years, whether President Obama's brief public statement was the final push the Chairman needed to finally embrace Title II, or whether the Chairman had already arrived at that conclusion, it was neither inappropriate nor compromised the independence of the FCC.

The Washington Post

Fact Checker

Will the FCC's net neutrality decision cost Americans $15 billion in new taxes? Nope

By Michelle Ye Hee Lee January 16

"Another reason this is so damaging to the private sector is the taxes that it is going to put on your broadband providers — an estimate of $15 billion in new taxes that would come in through a Title 2 regulation."

—Rep. Marsha Blackburn (R-Tenn.), Fox Business interview, Jan. 5, 2015

"Under this decision to reclassify broadband, Americans would face a host of new state and local taxes and fees that apply to public utilities. These new levies, according to the Progressive Policy Institute (PPI), would total $15 billion annually."

—Grover Norquist and Patrick Gleason from Americans for Tax Reform, reuters.com article, Jan. 6, 2015

There's a lot of buzz over "net neutrality," and it is bound to heat up more in the next month. The debate over net neutrality is highly technical and complex, and much of the disagreement is over sausage-making technicalities of utility regulation. But these two claims stand out because they refer to something that's easy to comprehend: How much it will cost the consumer?

At question is whether the Federal Communications Commission will change the way it regulates the Internet by "reclassifying" broadband providers as a public utility, like water, telephone or electricity. The FCC is expected to announce its decision by the end of February.

Opponents of the change argue it would cost Americans $15 billion a year, and consumers will see a significant spike in taxes and fees. Is that really the case?

The Facts

The FCC is weighing whether to reclassify broadband Internet access as a "common carrier" under Title II of the Telecommunications Act. This change would ensure "net neutrality," proponents say, because it would give equal

access to the Internet. It would prohibit Internet service providers, such as Comcast, from making agreements with Web sites, such as Netflix, to provide faster and more reliable connection for subscribers to stream movies and TV shows.

Opponents argue the "light-touch" regulatory approach has worked fine and the reclassification would hurt innovation. They say it would add billions of dollars in fees and taxes for American consumers. (For more on the debate, our colleague Brian Fung has a great primer that explains it in plain English.)

Blackburn and Norquist, who are conservatives, said they got the $15 billion figure from a December 2014 report by economists at the left-leaning Progressive Policy Institute. PPI calculated a host of state and local taxes and fees that could be assessed on broadband Internet service if it were treated as a traditional telephone service.

Researchers used current taxes and fees levied on telephone services and applied them to Internet services under the new FCC classification. They found new fees and taxes could reach $15 billion a year. (The report also calculates a separate set of federal Universal Service Fund fees totaling an extra $2 billion a year, but the FCC has not decided whether to extend these fees in case of reclassification.)

But after the report was published, Congress renewed the Internet Tax Freedom Act (ITFA), which prohibits state and local governments from levying new taxes on Internet access. So researchers published an article modifying the figure to $11 billion — a 27 percent decrease. The $11 billion figure was included in a footnote of the article, so it is not immediately clear that the original calculation was modified.

The authors noted their original analysis "did not consider state law limitations on the application of taxes and fees to jurisdictionally mixed services that are classified as interstate for regulatory purposes." This is important because the FCC could designate broadband as an interstate service, rather than a service that can be contained within state geographical boundaries. If that happens, the intrastate state and local fees in the analysis would not apply.

The breakdown of charges calculated is not available publicly, but co-author Hal Singer shared some examples with The Fact Checker. In California, for example, the charges included a universal lifeline telecom service surcharge, state 911 surcharge, local 911 surcharge and a public utility commission fee, among others.

Some experts say it's a stretch, if not flatly inaccurate, to consider 911 fees in the calculation. State or local 911 fees tend to be intrastate and are designed to recover a specific amount needed to run 911 call centers. The demand for 911 service is not contingent on the federal classification for Internet service changes. When we raised this to Singer, he said 911 fees are a modest portion of the state and local fees and would not decrease the $11 billion figure significantly.

"The point of the study is that reclassification puts 911 fees — and all of these other telecom-related fees — on the

radar," Singer said, and tax administrators could try to charge all of them. He also noted that some state and local governments are levying taxes and regulatory fees on wireless phone services (called Voice over Internet Protocol, or VoIP — an example of this is Vonage), regardless of the interstate designation.

A main critic of the study is Free Press, an organization that advocates for open Internet. Free Press and other open-Internet advocates say consumers will not see "even a penny more" on their bills as a result of reclassification. (There is a lot of back-and-forth on this, for those who want to dive into the wonkery.)

The reality may be somewhere in between. Tax and regulation experts interviewed by The Fact Checker had varying views on how much the FCC reclassification would cost consumers, and whether all consumers would see an increase in their bills. But they agreed it likely will cost *some* consumers *something*, depending on the final FCC definition and how individual state and local taxing jurisdictions react.

States have challenged some tax exemptions under ITFA in court, especially as landline revenues decline. If the FCC decides to reclassify, there likely will be more litigation to challenge what states or local governments can charge, experts said. "That leaves room for states to be more or less aggressive, depending on their politics toward taxpayers and what fiscal crises they may be facing," said Michael Dillon, tax attorney and expert on ITFA.

The Fact Checker asked aides of Blackburn and Norquist why they used the $15 billion number after it was modified, and given the caveats. Blackburn's spokesperson did not respond. John Kartch, from Americans for Tax Reform, said: "The piece referenced the PPI study, so we are dependent on what PPI would say on the difference between the numbers. The point of the op-ed is equally valid whether the number is $15 billion or $11 billion — taxpayers are getting the shaft either way."

The Pinocchio Test

It is impossible to quantify the exact impact of the potential FCC decision, since Internet regulation is a new area of policy. New taxes are prohibited as long as the Internet Tax Freedom Act is in effect, so it is inaccurate to say there would be $15 billion in new taxes. There may be state charges and fees, but there is no proof that all of the current fees on telephone services would apply again to Internet services. It will not add up to $15 billion, and likely not add up to $11 billion — the worst-case scenario. The researchers agree it is a "high-end" estimate, which was the purpose of the report.

There 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. But the researchers did not calculate a low-end figure for the report. In addition, the modification from $15 billion to $11 billion is a 27 percent decrease, yet the change is buried in a footnote and not readily visible

for the public.

The more complex the issue, the easier it is for politicians to obfuscate the reality with dramatic numbers. On behalf of the average American consumer, we award Three Pinocchios to the use of the $15 billion figure.

Three Pinocchios

(About our rating scale)

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Michelle Ye Hee Lee reports for The Fact Checker. Send her statements to dig into via e-mail, Twitter or Facebook.

Mr. JOHNSON. Thank you.

Mr. GOODLATTE. The Chair recognizes the gentlewoman from California, Ms. Chu.

Ms. CHU. Commissioner McSweeny, you state in your testimony that the FCC considers noneconomic values that are not generally protected by antitrust laws. These values include free expression, diversity of political discourse, and cultural development, and antitrust actions take into account economic considerations.

To what extent, if any, would antitrust actions taken by the FTC be able to take these factors into consideration?

Ms. MCSWEENY. I think you are correctly pointing out that the FCC proceeding does balance some of these noneconomic values and that generally antitrust law isn't the right framework in which to protect those. Antitrust law is quite correctly grounded on very rigorous analysis of harm to competition, and that is its primary focus.

Ms. CHU. Chairman Wheeler, when it comes to noneconomic values, the FCC is obligated to abide by national policy goals such as the goal that requires the FCC to seek to promote the policies and purposes of favoring diversity of media voices, vigorous economic competition, technological advancement, promotion of the public interest, convenience, and necessity. So basically, you have an obligation to promote diversity and competition in your regulations.

Can you describe this obligation, how it applies in this order, and why it matters?

Mr. WHEELER. Thank you, Congresswoman. I think that you have just identified the key issue that, and again, I want to emphasize, we work in tandem with the FTC; we should work in tandem with the FTC. It is a great one-two punch.

Their job is statutorily defined with one set of criteria, and our job is statutorily defined with another. Then what we have the statutory authority, mandate, to do, is to create regulations that address the kind of issues you talked about in terms of how you expand and protect the public interest, convenience, and necessity.

That is a big difference between us and the FTC, that we have this kind of regulatory authority on that kind of a set of standards to pass regulations that will govern how markets work different from the way the FTC has.

Ms. CHU. Now I would like to ask you about innovation. One of our key goals is to ensure that new entrepreneurs are able to thrive and innovate. You state that there would have been no AOL without the FCC's openness mandate.

Can you describe how enabling access for modems contributed to the growth of an entity like AOL?

Mr. WHEELER. Thank you, Congresswoman.

AOL was made possible by the fact that there were such things as commercially available modems. Remember the old Hayes modems that would squeak and screech at you?

Before the FCC stepped in, AT&T said you couldn't attach something like that to the lines. It was a foreign attachment. An alien attachment, it was called. If that had been the case, Steve Case wouldn't have been able to go out and build his business.

Openness is at the core of what built the Internet. And what we need to make sure continues is that that kind of openness is avail-

able for innovators who have an idea to reach their potential customers.

If Steve Case had had to go around and go to Dayton, and then go to Poughkeepsie, and then go to Minneapolis, and one step at a time, say, "Can I get on your network? Can I get on your network? Can I get on your network?" it never would have been possible. But because there is openness, the innovators of today don't have to do that. The two guys and a dog in a garage tomorrow can be online and have 100,000, and a week later have a million people. And I have seen those businesses develop that way.

When I was a venture capitalist for 10 years before coming to this job, I was involved in those. We would not have been able to invest money and create jobs had we not known that there was the opportunity for open access, that these innovators could take their idea out and test it in the marketplace, rather than have to go carrier to carrier knocking on doors and say, "May I please get on your network?" That is what is powerful about this.

Ms. CHU. It seems as though Open Internet actions were taken under both Republican- and Democratic-led commissions.

Can you give a prime example?

Mr. WHEELER. Yes, ma'am. As I indicated before, there was what the Republican-led commission did insofar as the wireless industry is concerned, when the big wireless carriers said that they were going to shut out the customers of the small wireless carriers, and the commission came in and said, "No, under Title II, you have to be open to roaming."

There was a situation where under a Republican administration, the commission said to Comcast, "No, you may not disadvantage this service provider. You must provide service." I think that we are continuing that tradition.

Ms. CHU. Thank you.

I yield back.

Mr. GOODLATTE. The Chair thanks the gentlewoman.

Recognizes the gentleman from Texas, Mr. Gohmert, for his questions.

Mr. GOHMERT. Thank you, Mr. Chairman. Thank you to the witnesses. Appreciate you being here.

Mr. Wheeler, a Wall Street Journal on article February 4 says about you that you wanted to leave some room for broadband providers to explore new business models. Is that correct?

Mr. WHEELER. I am not sure the article you are talking about, but one of the key precepts that we have been working on is how do we make sure that broadband providers have the initiative to be creative and the initiative to invest.

Mr. GOHMERT. So you do want to leave some room for broadband providers to explore different business models, correct?

Mr. WHEELER. Yes, sir. And we have also explicitly said that we do not cover what have been traditionally called specialized services or managed services. It was interesting to note that the Verizon CFO, about a week ago, said Verizon's growth opportunities are going to be in over-the-top services, and Internet of Things services, both of which it appears they are going to offer on their specialized services.

Mr. GOHMERT. We can find out those things from Verizon, but I was wanting to ask you directly about things that you specifically could answer from your own experience and knowledge.

There was a court ruling in January 2014 that threw out the prior effort to control the rules to control the Internet. What makes the new rules more able to withstand court challenge, Commissioner Wheeler?

Mr. WHEELER. Thank you for asking that question, Congressman.

The basis of the court's decision was that we had imposed common carrier regulation on the ISPs without classifying them as common carriers. The heart of this decision is that, in fact, we did classify them as common carriers, thereby addressing the principle issue in the Verizon decision.

Mr. GOHMERT. Okay. So different facts, you just used different words to describe it, is the way it sounds.

But I heard you just say Congress asked us to look at the rules. What from Congress asked the FCC to look at rules regarding the Internet?

Mr. WHEELER. The 1996 Telecommunications Act.

Mr. GOHMERT. Oh, so it was recent. That was 19 years ago. You seized on that to say Congress was asking you to look at the Internet, 19 years later.

Well, I would submit to you that something in 1996 had nothing to do with wanting you to take charge of the Internet.

And I would also thank you for your willingness to leave some room for exploratory business models and new business models. That is really so gracious of you, because before the FCC stepped in, everybody was able to explore new business models. The only difference is now you are playing God with the Internet saying, "I will decide. We will leave some room for you to come up with new business models."

That is not your job. The court said that in January 2014, and you can change the wording around, but it doesn't change the facts. And Congress is not asking you, was not asking you, to take over the Internet.

I want to make that clear. You find something in the last 4 years where Congress has passed it by elected officials of this country, and said, "Please take over the Internet," then that would be good evidence before this Committee.

But until that happens, some of us—most of us in the House and most of us in the Senate do not want you to decide who gets to develop a new business model and who cannot.

I yield back my time. Thank you.

Mr. GOODLATTE. The Chair thanks the gentleman.

Recognizes the gentleman from Florida, Mr. Deutch, for his questions.

Mr. DEUTCH. Thank you, Chairman Goodlatte, and Ranking Member Conyers.

Thank you to the witnesses for coming and subjecting yourselves to what we are providing.

At Rice University in 1962, President Kennedy asked the American people to envision the progress of the first 50,000 years of human history as if it took place in 50 years. And I quote, "Stated

in these terms," President Kennedy said, "we know very little about the first 40 years. Only 5 years ago, man learned to write and use a cart with wheels. Christianity began less than 2 years ago. The printing press came this year. And less than 2 months ago, during this whole 50-year span of human history, the steam engine provided a new source of power. Last month, electric lights and telephones and automobiles and airplanes became available. Only last week did we develop penicillin and television and nuclear power. And now, if America's new spacecraft succeeds in reaching Venus, we will have literally reached the stars before midnight tonight."

Surely, if President Kennedy were with us today, he would count the transformative power of the Internet as the start of a brand new day in the history of human progress. By his measure, in the matter of seconds, we have gone from a clunky desktop dial-up to lightning fast data at our fingertips and in our pockets.

From Google searches and PayPal transactions to Netflix shows and Facebook friends, I think we can all agree that the Internet has proven to be a platform capable of transforming every facet of our culture, our economy, and everyday life.

I think we can also agree that when it comes to regulatory or legislative changes to how we govern the Internet, our guiding principle must be to preserve it as a platform for progress and innovation. For many years, that guiding principle has been net neutrality, the principle that consumers and businesses can use the bandwidth that they pay for however they choose.

Mr. Chairman, protecting that freedom is a concern that transcends partisan boundaries. How do I know this? Because of the hundreds and hundreds of calls that we have received from constituents in recent months in support or net neutrality, they are not calling as Republicans or Democrats. They are small startups working on the next great social network. They are aspiring stars who are singing their hearts out on YouTube. They are professors collaborating with academics around the world on medical research. And they are seniors Face Timing with their grandchildren across the country.

I know that is true because, in my district, I have a lot of those.

They are Americans who don't want interference on the Internet, whether it comes from overly rigid regulations imposed by government, or anticompetitive agreements struck between corporations. And we can't blame them.

I am glad the debate between consumers and academics and businesses and cutting-edge telecom companies has moved past whether or not net neutrality is a good thing. The question that remains involves how we enforce that widely supported principle.

And to their credit, in the past decade or so, the FCC has attempted to enforce net neutrality using the lightest hand possible. Yet those strategies were slapped down by the courts.

Like many of my colleagues, I have some questions about how the Title II reclassification ruling, recently announced by the FCC, will play out in practice. How can we ensure that new regulations keep up with the rapid pace of advancements on the Internet? How can we work to promote affordability for consumers and bring con-

nections to underserved areas? How can we encourage investment in new infrastructure?

These are the kind of questions, Mr. Chairman, that this Committee ought to be focused on in the coming weeks and months. Instead, I fear that some of my colleagues in the majority are more concerned with turning net neutrality, an issue of longstanding bipartisan support, into another wedge issue for which to attack the President.

That being said, we don't have to treat Title II classification as the be-all and end-all solution to every issue regarding the Internet.

I look forward, Mr. Chairman, to digging deeper into the many issues that impact the regulation of the Internet, from common carrier classification to our antitrust framework.

Mr. Chairman, the space program created by President Kennedy may have aimed for the moon, but it yielded technological discoveries touching our lives in so many ways, and even contributed to the development and adoption of the Internet.

Today, cyberspace remains a great frontier for discovery for all, and we must work to ensure the Internet's power as a platform for innovation accessible by all continues to thrive. That is why this hearing is so important.

Chairman Wheeler, just two quick questions. Number one, does your action set rates and prices and regulate content? And number two, how will leveling the playing field for innovators and startups be good for my constituents?

Mr. WHEELER. Thank you, Congressman. No, we specifically forbear from rate regulation, tariffing, unbundling, and the traditional components.

Let me pick up on your——

Mr. GOODLATTE. Time of the gentleman has expired.

The gentlewoman from Texas has a unanimous consent request.

Ms. JACKSON LEE. Yes, Mr. Chairman. I ask unanimous consent to put into the record a letter dated January 29, 2015, for about four pages of signatures from law professors from as far away as New York Law School and the University of South Dakota School of law. I ask unanimous consent to place this in the record.

Mr. GOODLATTE. Without objection, that will be made a part of the record.

Ms. JACKSON LEE. And I ask unanimous consent, Mr. Chairman, to put into the record testimony on pages 148 to 150—148, 149, 150—from a hearing that we held on February 15, 2011, and questioning on the issue of competition. I ask unanimous consent.

Mr. GOODLATTE. Without objection, that will be made a part of the record.

[The information referred to follows:]

January 29, 2015

Edith Ramirez, Chairwoman
Julie Brill, Commissioner
Maureen K. Ohlhausen, Commissioner
Joshua D. Wright, Commissioner
Terrell McSweeny, Commissioner

cc: Deborah L. Feinstein, Director, Bureau of Competition
Francine LaFontaine, Director, Bureau of Economics
Marina Lao, Director, Office of Policy Planning
Jonathan E. Nuechterlein, General Counsel
Jessica Rich, Director, Bureau of Consumer Protection

Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Chairwoman Ramirez and Commissioners Brill, Ohlhausen, Wright and McSweeney,

We are professors of law, economics, business, communication, and political science with expertise in communications, competition, industrial organization economics and related fields. We support the adoption of Open Internet rules by the Federal Communications Commission (FCC), including a bright line ban on fees for any kind of preferential treatment ("paid prioritization"). To adopt such a ban, the FCC must reclassify broadband Internet access under Title II of the Communications Act and forebear from unnecessary regulation under that statute. We write to explain why a ban on paid prioritization under Title II, coupled with appropriate forbearance, would promote competition and other important values such as innovation, free speech, and economic growth.

We support the complementary roles of the Federal Trade Commission (FTC) and Federal Communications Commission (FCC) in protecting an open Internet. Reclassification of broadband Internet access service as a telecommunications service could remove that service from FTC oversight. While Title II gives the FCC the authority necessary to effectively protect consumers of broadband Internet access service, consumers would benefit from continued FTC oversight as well. Therefore, we support repeal of the provision that exempts common carrier services from the FTC's jurisdiction. However, given that the FCC will be able to effectively protect consumers under Title II even in the absence of FTC jurisdiction, any efforts to repeal the common

carrier exemption should not hold up the FCC's adoption of Open Internet Rules under Title II of the Communications Act.

Our letter responds to a recent letter to you from professors and scholars that incorrectly supposes that an FCC ban on paid prioritization under Title II would be inconsistent with sound competition policy.[1]

I. Competition Benefits of Prohibiting Paid Prioritization

A bright line ban on paid prioritization under Title II of the Communications Act, coupled with forbearance from large parts of Title II, would promote competition.

Rules banning paid prioritization would prohibit providers of broadband Internet access from charging edge providers for prioritized or otherwise enhanced access to their Internet access customers. By "paid prioritization" we mean payments from edge providers for priority, guaranteed bandwidth, or zero-rating (not counting an edge provider's traffic towards a user's monthly bandwidth cap), as well as any other technical or economic practice that gives edge providers that pay an Internet access provider an advantage over edge providers that do not pay.

The benefits to competition of prohibiting paid prioritization were recognized by the FCC, *In re Preserving the Open Internet*, 25 F.C.C.R. 17905 (2010), and accepted by the United States Court of Appeals for the D.C. Circuit as reasonable and grounded in substantial evidence, *Verizon v. Fed. Commc'n Comm'n*, 740 F.3d 623 (D.C. Cir. 2014), so can be sketched quickly here. (The court accepted the FCC's evidentiary basis for banning paid prioritization but found that the FCC had relied on an inadequate statutory basis for doing so. Reclassification and forbearance would solve that problem.)

The Internet is what economists call a "General Purpose Technology." It is a key technology, like the steam engine and the electric motor, that increases productivity economy-wide and drives an entire era of technological progress and economic growth.

The Internet's growth is propelled by a virtuous cycle of innovation. When new applications, content, and services are developed by edge providers, we use the Internet more, leading broadband providers to increase the speed and capacity of their networks, sparking the development of more and better applications, content, and services, faster networks, and so on.

A ban on paid prioritization will prevent broadband providers from slowing or breaking the virtuous cycle, particularly by chilling experimentation by emerging "garage entrepreneurs." If the next Facebook has to pay for an Internet fast lane, the

[1] Letter from Donald J. Boudreaux et. al to Chairwoman Ramirez and Commissioners Brill, Ohlhausen, Wright, and McSweeney (Dec. 8, 2014).

next Mark Zuckerberg might go into investment banking instead of creating the next big new thing on the Internet.

If allowed to charge edge providers for preferential access, broadband providers would have the incentive and ability to undermine the virtuous cycle in three competition-related ways. First, a broadband provider could harm competition by raising the costs of selected edge providers.[2] It might do that if an edge provider competes with the broadband provider's own current or planned offerings, or if it is paid to do so by the edge provider's rivals. Second, a broadband provider could exploit its gatekeeper position, or terminating monopoly, to impose excessive charges on edge providers for access or preferential access to the broadband provider's end users. Once an end user connects to the Internet through a broadband provider, the edge provider can interact with the end user only through the broadband provider selected by the end user. That relationship gives the broadband provider the ability to impose or negotiate excessive charges with most edge providers for access or preferential access to the broadband provider's Internet access subscribers, regardless of whether the broadband provider has market power over those subscribers.[3] Third, a broadband provider would have an incentive to degrade or decline to increase the quality of service provided to normal traffic, as by slowing capacity expansion, in order to push edge providers to pay for a technically superior service (e.g., prioritization or guaranteed bandwidth) and exploit its terminating monopoly more effectively.[4] Similarly, a broadband provider would have an incentive to set low monthly bandwidth caps in order to motivate edge providers to pay for exclusion from the bandwidth cap ("zero-rating").

Each of these threats to the virtuous cycle raises competition concerns. The first involves exclusionary conduct against targeted edge providers to exercise or maintain market power in a market for specific Internet content, applications or services. The second and third involve the exploitation of the market power over edge providers available to a terminating access monopolist to charge excessive prices to edge providers for access or preferential access to its subscribers. The letter from professors and scholars to which we are responding appears to allude to the first competition concern, but it ignores entirely the second and third competition problems.

An FCC ban on edge-provider payments for preferential access would address all three competition problems. By contrast, case-by-case antitrust enforcement after problems arise cannot address the second and third problem, and would address the first problem only in part.

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[2] 2010 Open Internet Order ¶¶ 21-23.

[3] 2010 Open Internet Order ¶ 24; van Schewick, *INTERNET ARCHITECTURE AND INNOVATION* 278-280 (MIT Press 2010).

[4] 2010 Open Internet Order ¶ 29; Nicholas Economides, *Why Imposing New Tolls on Third-Party Content and Applications Threatens Innovation and Will Not Improve Broadband Providers' Investment*, *in* NET NEUTRALITY: CONTRIBUTIONS TO THE DEBATE 87, 94 (Jorge Pérez Martínez ed., 2010).

An FCC rule banning paid prioritization would prevent market power arising from targeted exclusionary conduct, the first competition concern. Antitrust enforcement alone cannot fully address this problem because of the difficulty of proving an antitrust violation when the competitive harm arises from chilling potential competition and innovation by edge providers that are not yet a success or have not yet been imagined.

Antitrust cannot practically prevent the other two competition problems associated with paid prioritization: excessive access charges imposed by terminating monopolists and their incentive to degrade non-priority traffic or set low monthly bandwidth caps. That's because antitrust liability requires identifying anticompetitive conduct that creates or maintains market power. A firm's mere exploitation of market power through monopoly pricing or its decision not to invest in upgrading non-priority service or to impose low bandwidth caps would rarely satisfy this condition for antitrust enforcement. By relying on its broader public interest mandate, the FCC can prevent these competition problems by banning broadband provider charges for preferential access by edge providers.

There is no reason to suppose that a ban on paid prioritization will discourage broadband provider investment, and slow the virtuous cycle that way. The FCC's 2010 rule preventing paid prioritization was in place for more than two years, and continues to apply to Comcast under an FCC order, without any harm to broadband investment. Nor is there any evidence that past investments by broadband providers have been predicated on the expectation of charging edge providers for preferential access to end users.

Nor does a ban on paid prioritization disable the price system as a way to prevent Internet congestion from impeding high-value sites, so long as FCC rules allowing reasonable network management permit cost-based and application-agnostic congestion pricing to end users.[5] By contrast, if terminating monopolists are allowed to charge edge providers, they will have the incentive and ability to set prices well in excess of the costs that the traffic brings – which could not be policed after the fact without instituting an undesirable regulatory process for determining costs and prices.

In sum, we support a ban on paid prioritization on competition grounds. As explained in greater detail below, that ban must be instituted by rule and by the FCC, rather than under an antitrust theory alone. Such a ban will prevent excessive pricing by terminating monopolists, take away broadband provider incentives to degrade the quality of non-priority service or set low monthly bandwidth caps, and prevent the anticompetitive exclusion of targeted edge providers. This is the best approach for

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[5] Barbara van Schewick, *Network Neutrality and Quality of Service: What a Nondiscrimination Rule Should Look Like*, 67 STAN. L. REV. 1, 137-140 (2015), *available at* http://www.stanfordlawreview.org/sites/default/files/67_Stan_L_Rev_1_van_Schewick.pdf.

protecting the incentives of startups to experiment with new content, applications and services, and to protect the virtuous cycle of edge provider innovation and broadband investment.

II. Other Benefits of Prohibiting Paid Prioritization

Paid prioritization also threatens free expression and innovation – values that only the FCC can fully protect. While the FCC is tasked with promoting the public interest, antitrust law focuses more narrowly on preventing anticompetitive behavior that reduces competition and harms consumers. Antitrust law does not protect important non-economic values such as free expression and diversity, and, although the protection of innovation is a stated goal of antitrust policy, competition policy has at times struggled to incorporate innovation or dynamic efficiency concerns in its analysis.[6] As a result of these differences, U.S. antitrust law does not prohibit many forms of conduct that harm the values that Open Internet rules are designed to protect.[7] For example, U.S. antitrust law only addresses exclusionary conduct by a broadband Internet access provider against a specific application if the broadband provider itself (or one of its affiliates) participates in the market for that application.[8] Open Internet rules, by contrast, will prevent conduct or practices by broadband providers with respect to Internet content, applications and services even if the conduct could not easily be reached under the antitrust laws because the broadband provider itself did not compete with the affected application.

Speech values are central to the open Internet. Everything that occurs on the Internet is a two-way "conversation" between end-users: We speak to each other, exchange information, and participate in many different commercially significant and noncommercial activities.[9]

Paid prioritization threatens free expression, the diversity of voices, and civic engagement. Fees for preferential treatment may silence those who cannot afford the fees and, in any event, would make it more difficult for them to be heard. Those fees

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[6] Testimony of Tim Wu Before the House Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law, "Net Neutrality: Is Antitrust Law More Effective than Regulation in Protecting Consumers and Innovation?" (June 20, 2014), *available at* http://judiciary.house.gov/_cache/files/bcecca84-4169-4a47-a202-5e90c83a6876/wu-testimony.pdf.
[7] van Schewick, *Network Neutrality and Quality of Service*, *supra* note 5, at 10, 16-18, 54-64; Wu, Antitrust testimony, *supra* note 6; Brett Frischmann, INFRASTRUCTURE: THE SOCIAL VALUE OF SHARED RESOURCES 330-345 (Oxford 2012).
[8] van Schewick, *Network Neutrality and Quality of Service*, *supra* note 5, at 56-57.
[9] *See* Frischmann, INFRASTRUCTURE, *supra* note 7, at 334-45; Wu, Antitrust Testimony, *supra* note 6, at 1-3; van Schewick, *Network Neutrality and Quality of Service*, *supra* note 5, at 10, 16-18.

"may particularly harm noncommercial end users, including individual bloggers, libraries, schools, advocacy organizations, and other speakers."[10]

Paid prioritization also threatens to impede innovation, investment, and economic growth in ways that antitrust enforcement alone would not prevent. Charging edge providers for preferential treatment would be "a significant departure from historical and current practice," and "could raise barriers to entry on the Internet," especially for startup and "garage entrepreneurs" through both the fees themselves and the transaction costs "arising from the need to reach agreements with one or more broadband providers to access a critical mass of potential end users."[11] As the history of the Internet and the record of the FCC's current proceeding show, entrepreneurs and start-ups with little or no outside funding would not be able to pay these fees and would be unable to compete with those who can do so. Entrepreneurs with little or no outside funding have been important sources of innovation in the past, and, if not excluded by fees for access or preferential treatment, will continue to be important sources of innovation in the future.[12] For companies that can pay, such fees would increase the costs of innovation, reducing their incentives to innovate and invest.[13] Small businesses would face similar problems.

Even low fees for preferential treatment can chill speech and raise barriers to entry for start-ups, stifling the vibrant experimentation by low-cost innovators that drives innovation on the Internet. Thus, the harms from these fees are not limited to excessive fees or to discriminatory or exclusive offerings.

Antitrust enforcement cannot be relied upon to prevent the innovation and speech harms from fees for preferential treatment; an FCC rule prohibiting paid prioritization is required.

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[10] 2010 Open Internet Order, ¶ 76; Remarks of Jack M. Balkin at FCC Workshop on Speech, Democratic Engagement, and the Open Internet, December 15, 2009, Preserving the Open Internet, GN Docket No. 09-191, Broadband Industry Practices, WC Docket No. 07-52 (Dec. 22, 2009), *available at* http://apps.fcc.gov/ecfs/document/view?id=7020355385; Barbara van Schewick, *The FCC Changed Course on Network Neutrality. Here Is Why You Should Care*, STAN. LAW SCH. CTR. FOR INTERNET & SOC'Y BLOG (Apr. 25, 2014), http://cyberlaw.stanford.edu/blog/2014/04/fcc-changed-course-network-neutrality-here-why-you-should-care.

[11] 2010 Open Internet Order ¶¶ 24, 25-26, 76.

[12] van Schewick, INTERNET ARCHITECTURE AND INNOVATION, *supra* note 3, at 204-213, 207-210, 211-213, 290-293, 297-348, 355-356; Barbara van Schewick, Opening Statement at the FCC Workshop on Approaches to Preserving an Open Internet, at 1-6 (Apr. 28, 2010), *available at* https://www.law.stanford.edu/sites/default/files/publication/259136/doc/slspublic/schewick-statement-20100428.pdf; Barbara van Schewick, *The Case for Rebooting the Network-Neutrality Debate*, ATLANTIC (May 6, 2014), http://www.theatlantic.com/technology/archive/2014/05/the-case-for-rebooting-the-network-neutrality-debate/361809.

[13] 2010 Open Internet Order ¶¶ 26, 76; van Schewick, INTERNET ARCHITECTURE AND INNOVATION, *supra* note 3, at 278-280.

III. The Complementary Roles of the FTC and FCC

In the communications industries, the FTC and the FCC have complementary roles in preventing competitive harms and protecting consumers from deceptive and unfair conduct. One reason is jurisdictional: the FCC's authority under the Communications Act does not extend to every nook and cranny of the communications sector, and the FTC's enforcement authority does not reach services provided on a common carrier basis. Another is in focus: the FCC commonly proceeds by rulemaking (although it also engages in case-by-case adjudication); the FTC never relies on rulemaking in competition matters (although it has dormant competition rulemaking authority) and, in recent years, rarely does so in consumer protection matters. Finally, the FCC is tasked with protecting the public interest, which allows it to pursue a wide range of economic and non-economic goals such as promoting competition, innovation and free expression. By contrast, the FTC's role is limited to protecting competition and to protecting consumers against unfair and deceptive practices. Due to these differences, the FTC is unlikely to use rulemaking to prevent the three competitive problems from paid prioritization, when rulemaking is the only practical way to do so, and the FTC is unable to use rulemaking to address the additional problems paid prioritization causes for innovation and free speech.

The D.C. Circuit's recent *Verizon* decision makes clear that the FCC must reclassify broadband as a Title II telecommunications service in order to prohibit paid prioritization. Doing so would not lead to over-regulation: we would expect and encourage the FCC to regulate with a light touch under Title II through application of its forbearance authority. Since common carrier services are exempt from FTC jurisdiction, reclassification likely would remove broadband Internet access from FTC oversight. While Title II of the Communications Act allows the FCC to effectively protect consumers, consumers would benefit from allowing the FTC and FCC to work together, share their consumer protection expertise, and augment each other's resources, so we encourage Congress to repeal the provision that exempts common carrier services from FTC oversight. However, given that the FCC will be able to effectively protect consumers under Title II even in the absence of FTC jurisdiction, any efforts to repeal the common carrier exemption should not hold up the FCC's adoption of Open Internet Rules under Title II of the Communications Act.

Prohibiting paid prioritization by rule, as FCC reclassification and forbearance make possible, has a number of advantages over relying on after-the-fact adjudication by the FTC (or the Justice Department, or private plaintiffs) under the antitrust laws. As previously detailed, antitrust enforcement cannot prevent excessive access charges by terminating monopolists and their anticompetitive incentive to degrade non-priority traffic or keep monthly bandwidth caps low. It could not fully prevent competitive harms arising from targeted exclusionary conduct. Nor could it address the harms to

innovation and free speech resulting from any fees for preferential treatment. In addition, a bright line rule against paid prioritization would provide clear guidance to broadband providers, entrepreneurs and their investors, reducing uncertainty that could reduce their incentives to invest, avoid the administrative costs and delay associated with case-by-case adjudication under the antitrust laws, and allow start-ups and other actors with few resources to take advantage of the rule's protections.[14] Startups and innovators have consistently called for bright line rules, arguing that they do not have the resources to pursue long and costly case-by-case proceedings at the FCC against some of the largest companies in the world. The costs, uncertainty, and duration of such proceedings would make them a useless remedy.[15]

We strongly support antitrust enforcement, but we recognize that in order to prevent broadband providers from harming competition, innovation and free speech, any sensible comparison of the costs and benefits of relying on FCC rulemaking versus FTC adjudication for doing so would favor prohibiting payments for preferential access by FCC rule.

IV. Conclusion

After years of high-profile debate about net neutrality, a University of Delaware study found that 81% of the public opposes "allowing Internet service providers to charge some websites or streaming video services extra for faster speeds."[16] The American people are right. Such payments would raise the costs of entry to new edge providers, make it more difficult for many speakers to be heard, allow broadband providers to impose excessive fees on edge providers that become successful, give broadband providers incentives to degrade the quality of non-priority service and impose low bandwidth caps, and facilitate the anticompetitive exclusion of disfavored edge providers. Broadband providers must be prevented from charging edge providers for preferential access in order to protect the virtuous cycle of Internet innovation and free speech.

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[14] *See* van Schewick, *Network Neutrality and Quality of Service*, *supra* note 5, at 69-83.

[15] Many commenters explained that the "commercial reasonableness" standard proposed by the FCC in its May 2015 Notice of Proposed Rulemaking would require litigation far too expensive and slow for startups; the proposed commercial reasonableness standard included relief for "harm to competition" that appeared to reflect an antitrust standard or be even more lax. *See*, e.g., comments by Y Combinator at 3, http://apps.fcc.gov/ecfs/document/view?id=7521383177 ("No startnp has the fnnds and lawyers and economists to take on billion-dollar ISPs in an FCC action based on the vague legal standards in the proposal. Indeed, the startup ecosystem needs a bright-line, per se rule against discrimination."); Reddit at 8, http://apps.fcc.gov/ecfs/document/view?id=7521679127, ("We have no lawyers on staff, and we devote our resources solely to meeting the needs of our 100 million visitors. We do not have the resources to engage ISPs in a legal fight, with only a vague standard as our weapon, without any firm ground on which to stand. We need clear, bright-line rules.").

[16] Press Release, University of Delaware Center for Political Communication, National Survey Shows Public Overwhelmingly Opposes Internet "Fast Lanes" (November 10, 2014).

The FCC and FTC have complementary roles in protecting the Open Internet. The FCC should prohibit payments for preferential access by reclassifying broadband and forbearing from unnecessary regulation under Title II of the Communications Act. The FTC's consumer protection authority should be preserved by repealing the common carrier exemption from the FTC's jurisdiction, but any efforts to do so should not hold up the adoption of Open Internet rules.

Very truly yours,

(*Institutional Affiliations Provided for Identification Purposes Only*)

Mike Ananny	Assistant Professor of Communication & Journalism Annenberg School for Communication & Journalism University of Southern California Faculty Affiliate Science, Technology and Society University of Southern California
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Jack Balkin	Knight Professor of Constitutional Law and the First Amendment Yale Law School
Yochai Benkler	Berkman Professor of Entrepreneurial Legal Studies Harvard Law School

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Tim Wu	Professor of Law Columbia University

Excerpt from February 15, 2011 hearing.

Open Internet, I am quite confident that our existing antitrust laws and enforcement mechanisms would take care of the problem.

Mr. QUAYLE. Thank you very much. I yield back.

Mr. GOODLATTE. I thank you. I am now pleased to recognize the gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Mr. Chairman, my interest in this Committee is about creating jobs and competitiveness. I am going to kick the football in your direction, Ms. Sohn. Do you think that the Justice Department—and in this instance I think you said the FTC—the FTC are sufficient and have taken note enough to determine whether or not they need to file action and whether or not there is an anticompetitive impact on some of the entities that you are suggesting are negatively impacted, and is there a reason why they haven't acted?

Ms. SOHN. I believe that the Supreme Court has effectively gutted antitrust enforcement when it comes to regulated companies like the telephone and cable companies that provide broadband Internet access service. The Trinko case and the Credit Suisse case—and it is not just me saying this—Howard Shelanski, I mentioned him before, he testified in front of the Subcommittee on Courts in June, and he basically said that the Trinko and Credit Suisse cases have made it virtually impossible to apply antitrust.

Ms. JACKSON LEE. What would you offer as a remedy?

Ms. SOHN. I think Congress has to reverse those decisions and revivify antitrust law. I think it will be helpful in a lot of different ways.

Ms. JACKSON LEE. And that would be overall, because I think the antitrust laws are weak, period.

Ms. SOHN. Absolutely.

Ms. JACKSON LEE. We just recently saw a merger dealing with Continental and United, and it is almost as if the Justice Department said we have no teeth, we have no ability to respond. So you are suggesting a legislative fix?

Ms. SOHN. Absolutely. That is the only way you are going to be able to overturn a Supreme Court precedent like that.

Ms. JACKSON LEE. Mr. Downes, if you have large telecommunications companies who also operate as Internet service providers, and they might be perceived as unfairly thwarting competition by slowing down the Internet speed of access for customers who access the Web sites, do you see a solution for them? What solution would you offer?

Mr. DOWNES. So you are talking about telecommunication companies who also are service providers?

Ms. JACKSON LEE. And someone is trying to access, and because you have another provider, you might be slow in having access. Do you see a remedy for that?

Mr. DOWNES. Obviously, one remedy is to switch. You don't have to buy the whole bundle of services from the same provider. If you have more than one choice, you can have cable from Comcast and telephone from AT&T and Internet from Verizon if it is mobile. So you have your choice of providers in many areas.

In the areas you don't, I think one of the things to recognize is that—and we see it quite dramatically in what happened in Egypt over the last month. The very tools that have made the Internet

so powerful in the last few years in particular allow consumers really to exercise their dissatisfaction and unhappiness with governments or with companies much more easily and effectively and quickly than ever before.

Ms. JACKSON LEE. What I am trying to say, they try to access these giants from their Web site, from a competitor Internet service. That is the question. And they feel that they are not getting the access as quickly as possible. It can't be that they can go to Verizon. They are talking about those particular entities.

Mr. DOWNES. I'm not clear what you are asking. You're a Comcast customer and you want to go to Verizon?

Ms. JACKSON LEE. No. You are a small consumer and you are trying to go to AT&T or Verizon, and you are not able to access as quickly as you would like; it is a slow process. Do you think there would be any slowing down of the utilization of those services?

Mr. DOWNES. Well, it depends on what is causing the slowdown. A lot of times you experience slowdowns because of technical——

Ms. JACKSON LEE. You don't think it would be purposeful and you don't think that small companies should have some protection?

Mr. DOWNES. It could be purposeful.

Ms. JACKSON LEE. What would you perceive to be a remedy for that?

Mr. DOWNES. The antitrust enforcement mechanisms that already exist for anticompetitive behaviors that have demonstrable consumer harms.

Ms. JACKSON LEE. You feel comfortable that they are sufficient?

Mr. DOWNES. Yes. As I say, since we haven't tested them, we don't know. And we haven't tested them because we haven't needed to.

Ms. JACKSON LEE. Let me go to Mr. Glass. Let me ask you the same question. Do you believe that the current laws which protect against monopolies or duopolies in Internet service providers and broadband providers are sufficient? Do you believe antitrust laws can protect small companies?

Mr. GLASS. Ms. Jackson Lee, I think the law needs fixing. I am especially concerned about what will happen if the FCC rules stand, because as Ms. Sohn sort of alluded, when we become a regulated entity, then suddenly Trinko kicks in and we lose remedies under the laws.

Ms. JACKSON LEE. What do you want to see strengthened under the antitrust laws?

Mr. GLASS. I would like to have the ability to take action under antitrust to deal with the problem I am having right now—anticompetitive pricing of the inputs to my business by the telephone company.

Let me explain. I rent leased lines from the telephone company to connect me to the Internet. They charge me more per megabit per second for wholesale connections to the Internet than they do to retail consumers who are buying DSL from them. As a result, they are trying to make it impossible for me to be competitive and also be profitable. I would like to be able to take action about that.

Ms. JACKSON LEE. Do they argue that you are in an area that is difficult to serve? Do you make that kind of argument?

Mr. GLASS. Actually, there is no rational justification. The physical plant, the wires, have been fully depreciated for decades. There is no reason why they could sell me that access at a very low cost, except they want to prevent me from being a better competitor.

Ms. JACKSON LEE. Mr. Chairman, to conclude, we have had the privilege of serving on this Committee in past Congresses and, frankly, have had these hearings. I would make the argument that we want to see competitiveness. We like large companies and small companies. But I wonder whether or not we in the Judiciary Committee are going to be the only ones who will raise this concern and whether our collaborators on Energy and Commerce will not, and whether or not we will be able to move forward in trying to answer some of the concerns and still balancing the commitment to competitiveness and providing jobs that our large companies do provide.

I yield back.

Mr. GOODLATTE. I thank the gentlewoman for her comments, and look forward to working with her on that very objective.

It is now my pleasure to yield to the Ranking Member of the Subcommittee, the gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman.

I apologize to the Chairman and the witnesses for not being here earlier, and I thank Mr. Conyers and Ms. Chu for substituting for me. I had to go over to the White House to the Presidential Medal of Freedom presentation. One of my constituents, or somebody who lives just outside my congressional district was being honored, so I needed to be there, along with John Lewis and Stan Musial and Yo-Yo Ma and Warren Buffett and some other people. I didn't need to be there for those reasons, but I needed to be there for my constituent.

I thought I would not ask questions, but just sitting here listening to the questions that got asked, I got provoked to ask a couple of questions. Somebody was talking about somebody providing broadband over power lines. Who in the world is doing that, and who would have the incentive to do that in today's market? Is anybody actually doing that?

Mr. DOWNES. Yes. It's a technology that has been in development for quite some time.

Mr. WATT. Is anybody doing it?

Mr. DOWNES. There are a number of companies that are doing trials with it. It is very attractive for rural customers because the infrastructure is already in place. They already have electricity, where they may not have high-speed Internet connections, or they can't get mobile for obvious reasons. So it is, in fact, a very appealing technology, but so far it has not been commercially successful.

Mr. WATT. And would the FCC's order have some impact on that one way or another? I mean, would it disincentivize it or would it have any impact on it at all.

Mr. DOWNES. Well, the BPL providers would be subject to the same rules as any other Internet provider, assuming they're offering broadband speeds, which is what they are doing. My point was just that up until now, the FCC has not been particularly helpful in encouraging this new technology, and in fact has been criticized by the courts for rulings that have slowed down the deployment of

Mr. GOODLATTE. We have Members who wish to ask questions, and we have a vote on the floor, so with the forbearance of our witnesses, we would ask, if you are able to remain, please do so. And we will return and resume the hearing as soon as these votes are completed.

Committee will stand in recess.

[Recess.]

Mr. MARINO [presiding]. The Chair now recognizes the gentlewoman from Washington, Congresswoman DelBene.

Ms. DELBENE. Thank you, Mr. Chair.

Mr. MARINO. From the State of Washington.

Ms. DELBENE. From the great State of Washington.

Mr. MARINO. The great State of Washington.

Ms. DELBENE. Thanks, everyone, for being here with us today. This is an incredibly important issue to make sure we do everything possible to maintain an Open Internet.

As someone who has worked in technology, my background is a businesswoman and entrepreneur. I have definitely seen firsthand how we have had an evolution in how we connect and do business, and how that has completely transformed the way the world works, and how critical the Internet is now to everyday life.

In my district in Washington State, we have everything from farming communities to high-technology hubs, and they all will benefit from responsible and forward-looking net neutrality policies that will promote equal treatment of content and affordable access for consumers and for businesses. While there may be vast disagreements on the best way to achieve this goal, I just want to thank everyone for working toward this goal, because it is an important goal.

We now see legislation and changes that are taking place in the way the Internet works that really weren't anticipated when we put communications law in place. And I believe strongly, as a technology person, we need to do a better job of keeping laws up to date with the way the world works. Clearly, we haven't quite done that. We have a regulatory framework that is quite old.

And, Chairman Wheeler, I wondered if you agree with that statement, and if you look at the framework that you are working with right now, would you like to see changes there, so that we could do the best job possible of putting together a great environment to support innovation in this area?

Mr. WHEELER. Well, thank you, Congresswoman, and I agree. This is like that line in Through the Looking Glass that it takes all the running you can do to stay in the same place when you are talking about all the changes in the Internet.

It is interesting that the Communications Act itself, the Congress was incredibly farsighted in 1996, in particular, when they put in flexibility for decision-making to be made by the commission along the way. I think it is always worthwhile for Congress to involve itself in making sure that the statutes are up to date, but the flexibility that Congress has put in the statute has also enabled us to try.

But what we have tried to do is not to be prescriptive and say, "We are smart. We know what is going to happen in the marketplace. We know what technology is." But rather to say, let's have

a general yardstick that can be used to measure things that we have never thought about as they come along, and the authority to do something if, in fact, they fall short of that yardstick.

Ms. DELBENE. Now, I know there is a Republican draft piece of legislation that has been put together to actually put forward legislation on this issue, and the draft that I have looked at has some particular carve-outs in it, one for specialized services, which seems to be loosely defined, as I read it, and also a carve-out that seems to allow paid prioritization of certain Internet services where consumers specifically approve it.

I wondered if you had feedback, if you have had a chance to see some of this, and if you had feedback on those carve-outs, and how you think those might impact competition in the market.

Mr. WHEELER. Yes. Thank you, Congresswoman.

We have had conversations with the sponsors of the bill, expressing some concerns about those carve-outs and about the limitation on the ability of the agency to deal with what I just talked about, which is how do you have that yardstick going forward.

Ms. DELBENE. Commissioner McSweeny, by reclassifying broadband under Title II, the FCC gains the ability to govern privacy issues, and it might appear that the FTC in some cases loses some of this authority as well. I wondered if you would comment on whether you agree that that is true, or if that is an accurate assessment, and whether you see room for the FCC and FTC to collaborate to protect consumer privacy under Title II?

Ms. MCSWEENY. I absolutely see room for the FTC and FCC to collaborate on privacy. I think that would be very important. We already do work together and have had some recent examples of consumer protection cases where we have worked together very effectively.

As you point out, reclassification may have an impact on FTC jurisdiction. This is why the legislative recommendation that I am prepared to make today is repealing the common carrier exemption in the Federal Trade Commission Act.

I think that, as Chairman Wheeler has pointed out, it is wonderful when Congress takes the time to think about how to update the consumer protection laws. And from my perspective as an FTC commissioner, that would make a lot of sense.

But again, we can work with the FCC. We do work with the FCC. And I think consumer privacy is a priority for both the FTC and the FCC.

Ms. DELBENE. Privacy is an area that we have definitely seen legislation that is out of date, whether it is the Electronic Communications Privacy Act or other areas where legislation that was put in place decades ago hasn't been updated.

Do you think we can do it this way versus another legislative solution with respect to privacy?

Ms. MCSWEENY. Well, there are several recommendations that have been put forward. The Administration has put forward privacy legislation as well. All of these are really valuable contributions.

I would add that data security is a big priority of mine personally as well. And I would continue to support the passage of comprehensive data security legislation that would not only provide con-

sumers with breach notification, but would lay out stronger security standards.

Ms. DELBENE. Thank you.

Thank you, Mr. Chair. I yield back.

Mr. MARINO. Thank you.

The Chair now recognizes the gentleman from Florida, Congressman DeSantis.

Mr. DESANTIS. Thank you, Mr. Chairman.

Commissioner Pai, do you view this decision as being motivated by political pressure, the decision to regulate the Internet under Title II?

Mr. PAI. Congressman, I think there is no question that the public pressure put upon the agency by the November 10 announcement by the President was the defining factor in this proceeding. But for that announcement, we would not have made the decision we made.

Mr. DESANTIS. And in fact, once the decision was made public, you actually had the national Democratic Party praising the adoption of President Obama's Internet rules, correct?

Mr. PAI. That is correct.

Mr. DESANTIS. Now, in terms of the Internet being as it has been one of the keys being permissionless innovation, is Title II going to further that value or undermine that value?

Mr. PAI. I think it will undermine the value, Congressman. The best example of that is the Internet conduct standard. It throws seven vaguely worded factors up in the air, and says it is nonexhaustive. And when asked to clarify how exactly will this be applied, the FCC admitted on February 26, we don't really know. The FCC will sit there as the referee and throw the flag. That is the very definition of innovation only by permission.

Mr. DESANTIS. Absolutely, and when you don't have ex ante rules, I think it really stunts the ability of people to dedicate capital.

What about the taxes issue? It seems to me that this opens the door for taxes, Universal Service Fund taxes on people's broadband. And so when my constituents ask what is going on with the Internet, can I tell them with a straight face that they will not pay more as a result of this?

Mr. PAI. I don't think you can. I think the writing is on the wall. And I said on February 26, read my lips, more new taxes are coming. And it is going to be applied to broadband for the first time.

Mr. DESANTIS. And that obviously will be passed on to consumers, and it is going to make what they buy more expensive. There is just no way around that, right?

Mr. PAI. Exactly, and I think the other effect, which hasn't gotten a lot of attention, is it is particularly the low-income and underserved populations who rely on broadband for all kinds of things who are going to be disproportionally affected.

Mr. DESANTIS. In terms of the process, do you think that this complies with the Administrative Procedure Act? I remember when the notice was put out, Title II, I mean it was mentioned, admittedly, and I think Chairman Wheeler had pointed that out in a previous hearing, but it was not a notice about Title II being the central issue.

So you got a bunch of comments, true. But do you think that is the way the process should work?

Mr. PAI. I don't. I detail in my dissent all the reasons why I think the agency's decision did not comport with the Administrative Procedure Act. Just to give you one of many examples, the application of Title II to mobile broadband, nowhere in the document, in the Notice of Proposed Rulemaking, will you find the phrase "public switched network" and how Title II reclassification could work with respect to mobile. For good reason: the Verizon court itself said explicitly you cannot define mobile providers as common carriers under Section 332.

And so I think for a variety of reasons, the agency just didn't give the public sufficient notice of what it was going to do.

Mr. DESANTIS. Now, much has been made that there has been nearly 4 million comments during this period, but weren't there a lot of comments opposing using Title II?

Mr. PAI. There were, and my understanding is that the reply comment phase, the majority of those who weighed in, once the FCC's intentions became clearer, did oppose the application of Title II.

Moreover, I would point out, Peter Hart, who runs Hart Research Associates, a very respected Democratic polling firm, found by a 21 percent margin, the American people disagreed with what the FCC was proposing to do.

Mr. DESANTIS. So at this point, what is the way forward? I mean legally, I know you wrote a very well-written dissent. Clearly, this is already sparking litigation. I know that previous rules have had trouble in the courts.

Do you think that this is a legally flawed rule that will run into trouble with the courts?

Mr. PAI. I do, unfortunately. If past is prologue, we have years of litigation in front of us. The 2008 decision that the Chairman mentioned was rejected in 2010. The 2010 rules were rejected only in 2014. And given the likelihood of Supreme Court review here, we might be at the end of the decade before we resolve the propriety of these regulations.

Mr. DESANTIS. So if somebody comes to you and says, "Look, I don't want Comcast throttling my Internet service or doing this or doing that," what is your response as to how the Internet should work and the appropriate policy response, if any?

Mr. PAI. My response is encapsulated in Congressman Deutch's statement. All of us want a free and open Internet. There has been a bipartisan consensus for 2 decades that the Internet would be free and open with light-touch regulation. And I would argue the fact we are where we are, with the Internet economy the envy of the world, is precisely because the government has been restrained, has let the free market flourish and, where appropriate, has allowed antitrust to govern. But I fear that we are going on a different path now, a partisan one, which shouldn't be the case.

Mr. DESANTIS. And I agree. I will yield back in a second. The Clinton-Gore administration, they established this light-touch approach, a Democratic administration. It was continued through, and I think this is a major departure, and I appreciate what you have done to highlight the problems.

And I yield back.

Mr. MARINO. Commissioner Pai, would you please clarify something for me? You were asked the first question if you thought this was a political pressure, and you responded yes, public pressure. Did you mean public pressure or political pressure?

Mr. PAI. Congressman, what I meant was that, based solely on the statements the President made publicly, and on the statement on his Website, which is public, that alone imposed a lot of pressure on this formerly independent agency because we were clearly heading down a different path until the President's public announcements. And those pronouncements obviously had a very significant political effect on the decision-making.

Mr. MARINO. Just wanted a clarification for the record on that. Thank you.

Mr. PAI. Thank you.

Mr. MARINO. The Chair now recognizes the gentleman and my friend from New York, Congressman Jeffries.

Mr. JEFFRIES. I thank the distinguished gentleman from Pennsylvania.

If we can just pick up on that discussion, Commissioner Pai, you indicated that you thought it was public pressure brought to bear by President Obama in connection with what resulted in terms of the FCC order, is that correct?

Mr. PAI. That is correct.

Mr. JEFFRIES. So did the President engage in wrongdoing by articulating his position?

Mr. PAI. Oh, I certainly don't embrace the view that there was any kind of affirmative wrongdoing. I think, from my perspective though, as someone who cherishes the agency's independence, ideally, we should make our decisions based solely on the law and the facts and record, not on extraneous political considerations. And that is where my concerns kick in.

Mr. JEFFRIES. All right. Do you have any direct evidence, or even indirect evidence, that the decision that was made by the FCC is based on extraneous political consideration? What evidence do you have of that point?

Mr. PAI. The best evidence is the fact that the agency was considering two very different proposals until the November 10 announcement. Shortly after the November 10 announcement, the FCC publicly ruminated whether or not it needed to seek more comment because the President's plan had not been given sufficient attention by the agency.

Mr. JEFFRIES. Right. Now, there were over 4 million comments received, a majority of which expressed support for the Title II position, correct?

Mr. PAI. My understanding is the majority did, yes.

Mr. JEFFRIES. And that was the American people expressing their opinion in terms of petitioning the government, correct?

Mr. PAI. That is correct.

Mr. JEFFRIES. So it is your view that that had nothing to do with the ultimate decision that the FCC reached, that it was all about what President Obama said, who, by the way, is the leader of the free world, elected by the people of the United States of America. But putting that small fact aside for a moment, you don't think

that the FCC's decision had anything to do with public sentiment, which I gather in a representative democracy is pretty important?

Mr. PAI. I think, Congressman, the agency as an independent agency should render its decisions based on the law set by Congress and the facts in the record. Where the agency was on November 9 was very different even given the fact that we already had almost 4 million comments on the record.

The decisive event was what happened on November 10. And that is not something that is a fact. It is more an opinion expressed by a political actor.

Mr. JEFFRIES. Okay. Thank you.

Chairman Wheeler, I want to explore this concept of light-touch regulation. I think the previous questioner indicated that we have gone beyond that, but I wanted to actually explore that and drill down on that.

There are 47 sections, I believe, that are part of Title II, correct?

Mr. WHEELER. Yes, sir.

Mr. JEFFRIES. And I think you have expressly engaged in forbearance with respect to 27 of those sections. Is that correct?

Mr. WHEELER. It may actually be 48, and we have forborne from 27, yes.

Mr. JEFFRIES. Okay, thank you for that clarification.

In terms of what you have forborne, regulating the Internet providers as a utility or rate regulation, is that part of the forbearance that has taken place?

Mr. WHEELER. That is what we have not done, sir.

Mr. JEFFRIES. Exactly, that is what you have not done.

Can you talk about what else you have not done?

Mr. WHEELER. Yes, sir. You take a look at the classic components of utility regulation, and it starts with rate regulation. Then it is a process of tariffing. And then it is the process of "here is how you are going to run your network in terms of unbundling and providing services." Then it begins to go even further into, "Here is how you are going to operate your company. Here is how your board of directors will be structured. Here are the reports you will make to us. Here is the series of accounts. Here is how you will do your accounting and report to us." None of that is involved.

Mr. JEFFRIES. Okay. There has been some legitimate concern raised about how a consumer confronting discrimination would navigate their way through the FCC process as compared to an FTC process, if that were to avail itself. So could you walk me through sort of how your Open Internet order would allow for the adjudication of a consumer who is alleging discrimination in the form of either blocking or throttling?

Mr. WHEELER. Well, we are always responsive to petitions or information that we receive from consumers, and we have historically responded to both formal and informal complaints.

Mr. JEFFRIES. Okay.

Commissioner Wright, I think it is your position that the FTC's adjudication process may better serve a consumer. Could you elaborate as to why you think that may be the case, if that is your position?

Mr. WRIGHT. That is my position, and I appreciate the question. Thank you.

My position in brief is that a large amount of conduct that is banned or deterred under the FCC approach would be scrutinized under a case-by-case approach under the antitrust laws. The antitrust laws circa 1960 adopted an approach very similar to what is in the FCC order with respect to relationships between Internet access providers and content providers.

Over the last 50 years, that approach has largely been rejected out of an increase in economic learning. So it is my view that consumers benefit from the case-by-case approach because it allows them to accrue the benefits of conduct that helps consumers and increases innovation, but allows the antitrust laws to operate, to deter, to penalize conduct when it does harm consumers. I think that that is the right approach and the best balance for consumers.

Mr. JEFFRIES. Thank you, my time has expired, but could I just ask the Chairman for leave——

Mr. MARINO. Without objection.

Mr. JEFFRIES [continuing]. The Chairman for leave to ask Commissioner McSweeny if she could just respond. Thank you.

Ms. MCSWEENY. Sure, thank you, Congressman.

My position is that the optimal outcome for consumers is both the FCC having in place an Open Internet order, and the FTC being able to use its consumer protection expertise to protect consumers from deceptive advertising, unfair practices, and anticompetitive conduct.

To do that, we would need the common carrier exemption in the FTC Act to be removed.

Mr. JEFFRIES. Thank you, and I thank the Chair for the additional time.

Mr. MARINO. Thank you.

The Chair now recognizes the gentleman from Michigan, Congressman Bishop.

Mr. BISHOP. Thank you all very much for your testimony today.

I would like to go back to what Representative DeSantis started with regard to, Commissioner Pai, your dissent.

He broached the subject about lawsuits, and in your dissent you state that the trial lawyers will be able to open the Internet. Can you tell me about that? Are you suggesting that this is going to lead to rampant lawsuit abuse? And if, indeed, that does happen, what is the impact on the consumer, in the aggregate?

Mr. PAI. Thank you for the question, Congressman.

The FCC in its order explicitly opens the door to complaints both to the FCC and in any Federal court in the country under Section 208 of the Communications Act, from which the agency explicitly does not forbear.

As a result of also not forbearing from ex post regulation, but only ex ante regulation, the agency obviously invites litigation over the reasonableness of rates. And my concern is that litigation, as you know, generally does not produce anything good for the consumer at the end of the day, because, number one, those costs of litigation are passed on to the consumer, and number two, the companies, instead of having to spend their time innovating and delivering innovative services, have to spend time litigating.

So I think that is part of my concern, that the agency didn't explicitly shut the door on some of the litigation, both at the commission and in court.

Mr. BISHOP. Thank you very much.

Commissioner Pai, many of the FCC's conclusions regarding the competitive nature of the Internet marketplace are predicated on the notion that 25 megabits download speed is the appropriate threshold. That seems arbitrary to me. How did we get to that number and what does it mean?

Mr. PAI. Congressman, I share your concern. In December, the FCC voted to spend billions of dollars over the next decade deploying what it then called broadband, which was defined as 10 megabits per second for rural areas. In January, we suddenly decided that 25 megabits per second was the standard, which excludes most mobile broadband offerings, including 4G LTE. Suddenly, in February, we decided that everything, any kind of connection to the Internet was broadband.

So my concern is that instead of looking at it objectively and trying to figure out what do consumers use the Internet for, and trying to tailor our benchmarks to that standard, obviously with a little bit of an uptick based on the increased usage of the Internet over time, instead, we have picked a standard that allows us to achieve the regulatory goal of the moment. And that is not something that I think is objective or reasonable.

Mr. BISHOP. So that is a completely random, arbitrary number, 25 megabits.

Mr. PAI. Yes, if you look at the FCC's January decision, it was grasping for things like marketing materials, anything other than the actual uses of the Internet by the common online consumer.

Mr. BISHOP. Thank you, Commissioner.

Commissioner Wright, after the Trinko and Credit Suisse decisions, can an antitrust claim survive against an entity regulated by Title II?

Mr. WRIGHT. It is possible under very narrow circumstances post-Title II for a claim by a Title II regulated entity to survive. The vision of the relationship between regulation and antitrust contemplated by Trinko and Credit Suisse I think raises an important question. A lot of the questions today have touched upon the issue of whether regulation and antitrust are complements or substitutes, or whether they can work in tandem. Certainly, it is true that sometimes they can.

Here, however, I think that it is important to note that there is a real inherent conflict between the approach adopted in the FCC order and modern antitrust laws. Were it 1960, and 1960's antitrust approach to vertical restraints governing, the orders would be complements. They would work together quite well. However, what the order does is take conduct that the antitrust laws generally presume as procompetitive and declare them to be illegal and anticompetitive in all circumstances.

In a regime like that, where it is totally and plausibly the case that in other situations antitrust and regulation can coexist, here my fear is that there is an inherent and inevitable conflict that is going to result in marginalization of antitrust enforcement in favor of a view that looks much more like an antitrust era from the

1960's that virtually all antitrust scholars of any stripe have long since rejected.

Mr. BISHOP. Thank you, Commissioner.

I yield back.

Mr. MARINO. Thank you.

The Chair now recognizes the gentleman from Rhode Island, the former Mayor of the beautiful town of Providence, my friend, Congressman Cicilline.

Mr. CICILLINE. I thank the Chairman.

Thank you to the witnesses for this very important hearing, and thank you for being with us this afternoon.

Chairman Wheeler, I want to start with you. There was just reference made to this 25 megabits per second. I don't want to spend a lot of time on it, but would you just quickly explain why that isn't arbitrary, and that there is actually a basis for a use of that by the FCC?

Mr. WHEELER. Thank you, Congressman.

About 80 percent of America has access to that today, and that is kind of a definition of a performance standard.

Mr. CICILLINE. Great.

Commissioner Pai, you mentioned in your testimony several times that the Internet here in the U.S. is the envy of the world. I am wondering, in light of the fact that, for example, Akamai, which does an annual survey of the state of the Internet, ranks the top 10 countries on a whole range of things including connectivity, speed, availability. It rates Hong Kong, Singapore, South Korea, Japan, Israel, Romania, Uruguay, Latvia, Taiwan, and Luxemburg. The U.S. isn't even in the top 10. The World Economic Forum ranked the United States 35 out of 148 countries in Internet bandwidth. Other studies ranked the United States anywhere from 14th to 31st, globally, in average connection speed. Other countries with much more regulated markets have more options for Internet access at faster speeds and at a lower cost.

So I am wondering whether or not, in light of the fact that 75 or 80 percent of American homes only have one option, whether you consider, not only it the envy of the world, but equally importantly, that that is a competitive marketplace, when 75 or 80 percent of the consumers have access to one provider?

Mr. PAI. Thank you for the question, Congressman.

There are two components——

Mr. CICILLINE. I am sorry, may I also ask unanimous consent that those two reports, and an article entitled, "Why the U.S. Has Fallen Behind in Internet Speed and Affordability," in the New York Times on October 3, 2014, be made part of the record.***

Mr. MARINO. Without objection.

Mr. PAI. Thank you for the question, Congressman. There are two components to the answer.

First, with respect to the overall Internet ecosystem, there is no dispute that America's online platform is the greatest in the world for innovation and investment. That is the reason why we see such great companies, such as Google, Facebook, Netflix, Twitter, et

***Note:** The submitted material is not printed in this hearing record but is on file with the Committee and can be accessed at:

http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=103236.

cetera, building on top of this broadband infrastructure that we have in the United States.

Secondly, with respect to some of the countries you mentioned, the United States is in a very different situation from say Taiwan or Latvia. We have a very sparsely populated country by comparison. And part of the benefit of having the American communication system we have is that we have a commitment to universal service, and we try to connect as many people as possible in this country to the opportunities online. That is a difficult thing to do when you are talking about places like my home State of Kansas, for example.

Nonetheless, however, as the Chairman pointed out, 80 percent of Americans have access to 25 megabits per second speeds. That is remarkable when you think about how dispersed our population is.

Now, with respect to the second part of your question, you put your finger on the exact problem that we should try to solve at the FCC. How do we get more competitive alternatives into the marketplace? That is why I focus on a variety of different policies making it easier to deploy wireless infrastructure, getting more spectrum out there, embracing the IP transition. Those are things that could give people more alternatives than just the one or the none.

Mr. CICILLINE. Chairman Wheeler, could you respond to that?

Mr. WHEELER. This will shock everybody to find that Commissioner Pai and I are actually agreeing on something today. But I think there are multiple reasons. One is our geography. Two is the national investment that they have made that we have not.

But the key that we are guiding on, Congressman, is what is it we are doing today to make sure that that chart doesn't exist tomorrow? Because the chart is the result of decisions made a decade ago.

I think there are three things to it. One is competition. We have to have competitive broadband providers. Two is spectrum, because spectrum is the pathway of the 21st century. And three is we have to have openness, because if these entities are allowed to build and then act as gateways where they make the decision of how networks are used, we will continue to fall down that list.

Mr. CICILLINE. Mr. Chairman, one of the criticisms of the order of the FCC has been that it would either discourage or suppress capital investment in broadband, which is obviously necessary to accomplish just what you described.

Would you respond to that? And have you seen any evidence of that?

Mr. WHEELER. Thank you, Congressman. A couple of quick examples.

Number one is if you take a look at investment over the last 18 or 20 years, what you will find is that the highest level of investment was when broadband—DSL at the time—was regulated under Title II. Then it kind of dips down and you are in a period where there is no regulation, and then the 2010 Internet rule comes in and it goes back up. So the fact of the matter is that, one, it is cyclical, and, two, it doesn't seem to be impacted by these rules.

The other thing that is interesting is to watch Verizon in the wireless space. Verizon paid $4.7 billion at auction to buy C Block spectrum, which was encumbered with a requirement by the commission that it follow certain Open Internet-like rules, the only piece of spectrum where that ever has applied.

They paid top dollar for it. They built it out. And not only did they build it out, that is where they put America's first 4G LTE network. And clearly, those kind of openness rules neither held them back on their investment, nor held them back on putting the latest technology in place.

Mr. CICILLINE. Thank you.

I thank you, Mr. Chairman. I yield back.

Mr. MARINO. Thank you.

The Chair recognizes the gentleman from Texas, the former United States attorney, Congressman Ratcliffe.

Mr. RATCLIFFE. Thank you, Mr. Chairman.

Thank you, Chairman Wheeler and all of the commissioners for being here today.

I have only been in Washington for two and a half months. One of the reasons that I have the opportunity to be here is because the people back in my district, back in Northeast Texas, are extraordinarily frustrated with Washington. And that frustration can be summed up on two points: one, executive overreach; and two, intrusive government regulation.

So as to that first point, my constituents overwhelmingly believe that this Administration has ignored the Constitution, changing, waiving, and entirely suspending laws. And in fact, it is beyond debate but that Obamacare has been waived or delayed more than 20 times. Now more recently, we are dealing with the fact that laws have been suspended, which allow 4 to 5 million unlawful immigrants to remain in this country.

To the second point, we are seeing an expanding government that tries to impose regulations into the everyday lives of the people that I represent. The Obama administration in the President's first term averaged seven new Federal regulations every single day, each one of those regulations a tax, each one of those regulations some abridgement of someone's freedom in this country.

Which brings us to this most recent encroachment of freedom on the people that live in my district, and, indeed, this 300-page net neutrality rule really embodies the two things that my constituents dislike the most about Washington, frankly, a total disregard for the constitutional separation of powers and the government trying to reach further into their lives.

It, certainly, appears to me that one of the most frustrating things about this regulation is that it is a solution in search of a problem that doesn't exist.

So I have to ask, why did this happen? And it begs the question, did this happen for political reasons?

So, I would like to ask this question, was this decision motivated by politics, Commissioner Pai?

Mr. PAI. Congressman, I don't know what the specific motivation was. What I can tell you, however, is that it did not address a problem that actually existed in the marketplace.

Mr. RATCLIFFE. Commissioner Wright, do you believe that there were political motivations here?

Mr. WRIGHT. I, certainly, being a whole different building down the street can't speak to what was going on in the FCC, so I have no opinion on the decision-making process at that agency.

Mr. RATCLIFFE. Ms. McSweeny?

Ms. MCSWEENY. Like Commissioner Wright, I don't have any visibility into the decision-making process of the FCC.

Mr. RATCLIFFE. So let me turn to the Chairman.

Was this politically motivated?

Mr. WHEELER. This was based on a record, an extensive record that had millions of comments in it and was, from the very beginning, an attempt to follow on in the precedent of the commission that had established under both Republican and Democratic Chairmen.

We have talked about how previous Republican Chairmen and Republican commissions have moved to have openness in the wireless industry by invoking Title II, how they have moved against Comcast for blocking on the Internet, how the kinds of blocking, throttling, activities that are in our order are also in the bill that——

Mr. RATCLIFFE. Well, let me reclaim my time here, Mr. Chairman, because I heard your testimony earlier about throttling and blocking, and some of the examples. And obviously, you disagree with my opinion that this is a solution in search of a problem.

So let me ask you this question, to the extent, and you went through some examples with Comcast and Verizon, but to the extent there was actual anticompetitive conduct occurring on the Internet, and the FCC simply chose not to intervene, what would prevent the FTC from prosecuting?

Mr. WHEELER. I think that the issue for the FTC is whether the actions fall within the gambit of their authority. And as we have discussed earlier with another Member, there is a different set of authorities that we have. And we felt that they definitely did fall within our gambit.

Mr. RATCLIFFE. Well, let me move to the issue of cost here, and how this rule is going to affect the cost of the constituents that I represent.

Let me start with you, Commissioner Pai. Is this going to make what people buy in my district on the Internet more expensive?

Mr. PAI. Yes, it will.

Mr. RATCLIFFE. And what would be the reasons for that?

Mr. PAI. The reclassification of broadband as a telecommunications service, and the consequent imposition of Universal Service Fund fees will increase consumer broadband bills. And it is just a question of when, not if, those increased fees are going to be passed on.

Mr. RATCLIFFE. Chairman Wheeler, do you agree with that?

Mr. WHEELER. I have a different opinion, and as I said before, universal service is kind of a red herring. Commissioner Pai is on the joint board that will make a recommendation on that, and I think I have been gathering what his vote is going to be.

But insofar as the other activities, I think that we are going to be promoting competition, and competition increases speed and drives down cost.

Mr. RATCLIFFE. Mr. Chairman, I would love to ask more questions, but my time has expired.

I yield back.

Mr. MARINO. Thank you.

Ladies and gentlemen, this concludes our hearing. Thanks to all of our witnesses for being here. I want to thank the people in the gallery for spending time here.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

This hearing is adjourned.

[Whereupon, at 5:31 p.m., the Committee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Response to Questions for the Record from the Honorable Tom Wheeler, Chairman, Federal Communications Commission

Questions for the Record from Representative Steve Chabot (OH-1)

Question: My understanding is that the drastically declining compensation rates for IP Relay Service - adopted before you joined the Commission -- drove out all of the providers except one, and that the FCC had to raise the rate from approximately $1.00 to up to $1.67 in order to keep that provider from leaving the service. This was a terrible development for the deaf, particularly the deaf-blind, who depend on this service. The remaining provider will have no incentive to provide quality service or innovative products. I understand that this took place before you became Chairman, but how did the FCC arrive at a $1.00 compensation rate for IP Relay?

Response:

The Consumer and Governmental Affairs Bureau (CGB or Bureau) of the Commission, pursuant to delegated authority, typically establishes TRS Fund compensation rates after reviewing the recommendations of the TRS Fund Administrator which includes cost data and demand projections supplied by the service providers. The rates are established before the commencement of the July 1 – June 30 Fund Year, and they remain effective throughout the Fund Year. IP Relay rates are determined pursuant to a price cap methodology, which contemplates a three year rate cycle with predictable adjustments of the rate in the second and third years, in accordance with specific adjustment factors. On occasion, however, situational changes occurring during a Fund year have required the Bureau to make mid-term adjustments in TRS Fund compensation rates or contribution factors. A new three year cycle began in the 2013-14 Fund Year. For that year, the Bureau established the base rate as $1.0147 but later raised it to $1.0309. The base rate was established at a level substantially higher than the average costs reported by those providers who were offering IP Relay service at the time the costs were reported.

In 2013, after the Commission investigated the user registration and verification practices of a number of IP Relay service providers, three providers terminated their provision of IP Relay service. In October 2014, one of the two remaining IP Relay service providers announced that it too was terminating its provision of the service, effective November 15, 2014. The remaining provider, Sprint, filed a request seeking a temporary adjustment of the per-minute compensation rate for IP Relay service, arguing that the existing, averaged compensation rate did not reflect its individual costs and that its costs would increase due to the need to quickly ramp up service to accommodate users migrating from Purple Communications' (the exiting provider's) service.

On December 29, 2014, the Bureau adopted a mid-year adjustment to ensure that Sprint is reasonably compensated for providing service to eligible users, including those who migrated from Purple Communications. This adjustment was deemed necessary to ensure that IP Relay service will continue to be provided without interruption, especially to those consumers who rely on IP Relay service as their sole or primary source of functionally equivalent telephone service.

Question: I am concerned that this will happen again in commercial Video Relay Service- the most critical service for the deaf-- because of similarly drastic and ongoing compensation rate cuts, which the courts found did not consider service quality improvements. Will you review,

and if necessary to allow for a meaningful review, pause these ongoing cuts, to ensure that this critical service can be preserved and improved?

I am concerned that the focus on driving rates down in both IP Relay and commercial VRS comes at the expense of providing quality, functionally equivalent services to the deaf. I would like you to review these rate cuts.

Response:

In 2013, the Commission unanimously adopted an Order and Notice of Proposed Rulemaking (NPRM) to reform the Video Relay Service (VRS) program. In that Order, the Commission recognized the benefits of having multiple VRS providers in order to ensure high quality, functionally equivalent service. For that reason, and to improve the predictability of reimbursements and assist providers in planning efficiently for the transition to a new ratemaking approach that would use competitive bidding to establish market-based rates, the Commission adopted a gradual four-year schedule for adjusting rates in the direction of cost based levels. In slowly adjusting the compensation rates during the period in which it is implementing structural reforms, the Commission is trying to give all VRS providers, and especially the smaller ones, a reasonable opportunity to grow, increase efficiency, and to test the value of their service on a level playing field. In the NPRM portion of that order, the Commission sought comment on proposals to use auctions and other methods to establish such market-based rates. In the next report and order and NPRM in the VRS Reform proceeding, the Commission expects to address these issues further.

We are in the second of the four years contemplated by the Order to implement the various reforms, and are on track to successfully implement all of the steps outlined by the Commission in 2013. For example, on May 1, the Commission announced the award of a contract to develop an open source video access platform for use by VRS providers and the deaf community. As for the rates specifically, in 2012-2013 the Commission received rate recommendations from the TRS Fund Administrator, audits of the providers by the FCC Office of Inspector General, input from the industry and consumer groups, and internal analysis of the financial information submitted by the VRS providers. The Commission adopted a relatively gradual, steady 4-year reduction in rates to the levels proposed by the TRS Fund Administrator, and consistent with recommendations by the IG's office.

The Commission also proposed in 2013 to move toward a market-based competitive bidding mechanism for the establishment of long-term VRS rates, following the implementation of structural reforms, and that competitive bidding proposal is still under consideration. In recent weeks, the Commission has received financial data from the Fund Administrator and from various providers. On March 30, 2015, six VRS providers submitted a request for a one-year delay in the four-year schedule of rate adjustments. The Commission will consider these arguments, as well as the data submitted, as part as its oversight of VRS programs and compensation rates. The proposal will be put forth for public comment this month. .

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