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

February 6, 2019

TO: Republican Members, Subcommittee on Communications and Technology

FROM: Committee Republican Staff

RE: Hearing entitled "Preserving an Open Internet for Consumers, Small Businesses and Free Speech." February 7, 2019 at 11:00 a.m. in 2322 Rayburn.

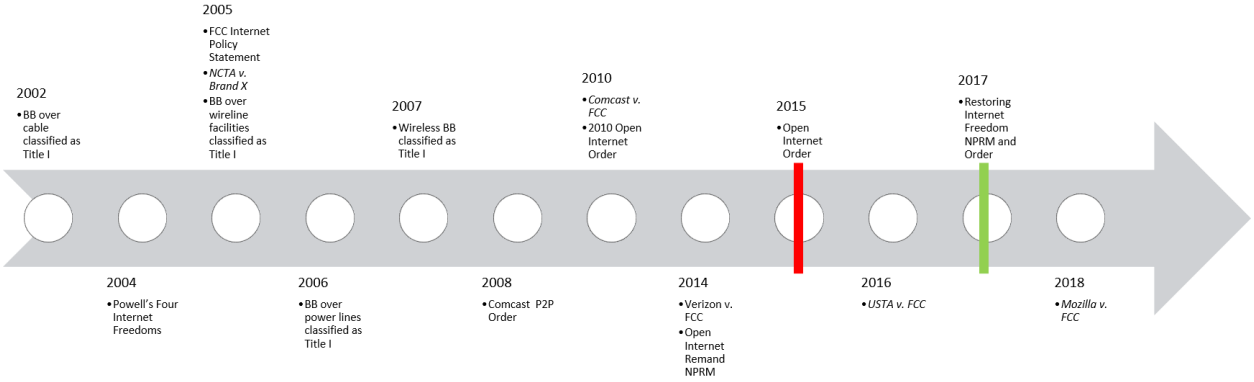
I. SUMMARY

- It is time to resolve the regulatory uncertainty involving regulation of the Internet with legislation.
- Clear rules of the road will protect consumers and will also ensure that the Internet continues to flourish.
- There is consensus around prohibiting blocking, throttling, and anticompetitive conduct.
- Heavy handed common carrier regulation is not needed to provide these consumer protections.

II. WITNESSES

- Michael Powell, President and CEO, NCTA – The Internet & Television Association;
- Joseph Franell, General Manager and CEO, Eastern Oregon Telecom;
- Tom Wheeler, Fellow, Brookings Institution;
- Jessica Gonzales, Deputy Director and Senior Counsel, Free Press & Free Press Action Fund;
- Denelle Dixon, Chief Operating Officer, Mozilla; and,
- Ruth Livier, actress, writer, and UCLA doctoral student.

III. BACKGROUND



From 1996-2015, the Internet grew at a rapid, and unprecedented, pace. This was due, in large part, to the Telecommunications Act of 1996, which codified the differences between lightly regulated "information services" and more heavily regulated "telecommunications services."[1] President Clinton and Congress found that the "Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation,"[2] and declared it the policy of the United States to "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[3]

The Federal Communications Commission (Commission) followed this bipartisan framework over the next 16 years, largely classifying broadband Internet access service as an "information service" under Title I of the Communications Act. In 2002, the Commission classified broadband Internet access service over cable systems as an "interstate information service."[4] The Supreme Court upheld this classification as a lightly-regulated Title I information service.[5] Over the next three years, the Commission also classified as an information service the following: broadband Internet access service over wireline facilities,[6] broadband Internet access service over power lines,[7] and wireless broadband Internet access service.[8]

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[1] 47 U.S.C. § 153(24), (53).
[2] 47 U.S.C. § 230(a)(4).
[3] 47 U.S.C. § 230(b)(1), (2).
[4] *See Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, (2002), https://docs.fcc.gov/public/attachments/FCC-02-77A1.doc.
[5] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).
[6] *See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al*., (2005) https://docs.fcc.gov/public/attachments/FCC-05-150A1.doc.
[7] *See United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, (2006) https://docs.fcc.gov/public/attachments/FCC-06-165A1.doc.
[8] *See Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*,(2007) https://docs.fcc.gov/public/attachments/FCC-07-30A1.doc.

During this same time, the Commission took steps to preserve consumers' freedom on the Internet while continuing its mandate from Congress to promote innovation and competition. In 2004, then-Chairman Powell challenged broadband Internet access service providers to preserve the four "Internet Freedoms," including the freedom to access lawful content, the freedom to use applications, the freedom to attach personal devices to the network, and the freedom to obtain service plan information.[9] The Commission unanimously endorsed these principles in the *Internet Policy Statement*.[10] When the Commission attempted to enforce these principles in 2008, the D.C. Circuit Court of Appeals held that the Commission did not have the authority under its ancillary jurisdiction to do so.[11]

This led the Commission to adopt its first set of rules regulating the specific practices of broadband Internet access service providers.[12] Consistent with its previous classification decisions, the Commission relied on section 706 of the Telecommunications Act under its Title I authority to establish the legal basis for these new rules. These rules were challenged in court, and the D.C. Circuit vacated the no-blocking and no-unreasonable-discrimination rules adopted in the *Open Internet Order*, finding that the rules impermissibly regulated broadband Internet access service providers as common carriers.[13]

In 2014, in response to the remand, the Commission under then-Chairman Wheeler proposed a new set of rules to govern the behavior and practices of broadband Internet access service providers. These proposed rules relied upon the Commission's Title I authority, maintaining the Commission's consistent approach to broadband classification as an "information service."[14] When the final rules were adopted in 2015, the Wheeler Commission made a drastic shift from existing precedent and, for the first time, classified broadband as a utility-style telecommunications service under Title II.[15] A divided panel of the D.C. Circuit upheld the Title II regulatory classification as a permissible under the *Chevron* doctrine, but there are concerns that Title II regulation may have decreased online innovation and investment, and broadband deployment.[16]

In 2017, on its own motion and not under the confines of a remand, the Commission proposed to return to the prevailing view that the Internet should be free of burdensome regulation, and restore the classification of broadband Internet access service to the information

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[9] Michael K. Powell, Chairman, FCC, Preserving Internet Freedom: Guiding Principles for the Industry, Remarks at the Silicon Flatirons Symposium (Feb. 8, 2004), https://apps.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf.
[10] https://docs.fcc.gov/public/attachments/DOC-260435A1.doc
[11] *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).
[12] *See Preserving the Open Internet; Broadband Industry Practices*, (2010) https://docs.fcc.gov/public/attachments/FCC-10-201A1_Rcd.pdf.
[13] *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).
[14] *Protecting and Promoting the Open Internet*, (2014) https://docs.fcc.gov/public/attachments/FCC-14-61A1.docx.
[15] *Protecting and Promoting the Open Internet*, (2015) https://docs.fcc.gov/public/attachments/FCC-15-24A1.docx.
[16] *US Broadband Investment Rebounded in 2017*, United States Telecom Association (2018) http://ustelecom.org/wp-content/uploads/documents/USTelecom%20Research%20Brief%20Capex%202017.pdf

service classification under Title I.[17] In December 2017, the Commission officially reversed the Wheeler Commission's abrupt shift to heavy-handed utility-style regulation of broadband Internet access service and returned to the light-touch framework under which a free and open Internet underwent rapid and unprecedented growth for almost two decades.[18] The Commission also determined that it did not have the legal authority to apply conduct based rules to broadband providers, but by continuing to apply a transparency rule, combined with other consumer protection laws, it still preserves consumers' freedom on the Internet to access lawful content, use applications, attach personal devices to the network, and obtain service plan information. On February 1, 2019, the Commission sought to defend these Internet freedoms against a suit by Mozilla in the D.C. Circuit Court of Appeals.

IV. DISCUSSION

As the timeline and background discussed above convey, great uncertainty exists about the regulatory classification of the Internet. This type of regulatory uncertainty can have negative impacts on investment in broadband deployment, which can harm innovation and broadband availability. In order to close the digital divide and allow the Internet to flourish as it did from 1995-2015, it is time to settle the issue with bipartisan legislation.

Despite all the debates, there really is more consensus on these issues than it appears. There is unanimous agreement from advocates on both sides of the aisle, as well as the broadband providers themselves, that Internet service providers should not engage in blocking, throttling, or anticompetitive conduct. But there is no need for outdated, heavy-handed common carrier regulations that could impose rate regulation, among other burdens, in order to provide these consumer protections. The Internet grew rapidly, in large part, due to the light-touch regulatory framework. We can protect consumer freedom online while continuing to advance innovation on the Internet, and we look forward to working with our colleagues across the aisle to advance legislation on this important topic.

V. STAFF CONTACTS

Please contact Robin Colwell or Tim Kurth of the Republican Committee staff at (202) 225-3641 if you have questions about the hearing.

[17] *Restoring Internet Freedom*, (2017) https://docs.fcc.gov/public/attachments/FCC-17-60A1.docx.
[18] *Restoring Internet Freedom*,(2017) https://docs.fcc.gov/public/attachments/FCC-17-166A1.docx.