

ONE HUNDRED FOURTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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MEMORANDUM

October 23, 2015

To: Subcommittee on Communications and Technology Democratic Members and Staff
Fr: Committee on Energy and Commerce Democratic Staff
Re: Hearing on “Common Carrier Regulation of the Internet: Investment Impacts”

On Tuesday, October 27, 2015, at 10:00 a.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Communications and Technology will hold a hearing titled “Common Carrier Regulation of the Internet: Investment Impacts.”

I. BACKGROUND

A. Telecommunications Act of 1996: Defining Telecommunications Services and Information Services

In 1996, Congress passed the Telecommunications Act, creating a regulatory regime that classifies electronic communications as either a “telecommunications service” or an “information service.” Telecommunications services are basic transmission services like telephone calls that the FCC regulates as common carriers using authority it is granted in Title II of the Act. In contrast, information services are those that encompass the bare transmission capability of a telecommunications service but also include the ability for “generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information” over a transmission line.¹

B. 2010 FCC Net Neutrality Rules Adopted Under Title I Ancillary Authority

The FCC adopted three rules under its Title I ancillary authority in 2010 to protect the free and open Internet: (1) a transparency requirement that broadband providers disclose their network management practices, (2) a no blocking rule, and (3) a nondiscrimination rule for

¹ Telecommunications Act of 1996, Section 151.

wireline broadband providers.² Recognizing that broadband Internet access is essential for participation in the American economy, the FCC adopted these rules to keep American consumers in control of their experiences online and to ensure innovators and competitors were protected from potential abuses of market power by broadband providers.

Verizon sued the FCC to overturn the rules specifically contesting FCC’s statutory authority to regulate broadband access services as common carriage. In *Verizon v. FCC* (2014), the U.S. Court of Appeals for the D.C. Circuit affirmed the FCC’s authority to regulate broadband under Section 706 of the 1996 Telecommunications Act. Congress directed the FCC under Section 706 to encourage the deployment of “advanced telecommunications capability” to all Americans on a reasonable and timely basis.³ But in the same decision, the court vacated the FCC’s rules banning blocking and unreasonable discrimination, and remanded the FCC order back to the agency for further consideration. The court reasoned that these two bans on blocking and discrimination are types of common carrier regulation, unsupported by FCC precedent and precluded by Communications Act provisions prohibiting common carrier regulation of non-common carriers.⁴

C. Open Internet Rulemaking Proceeding Under FCC Chairman Wheeler

i. Notice of Proposed Rulemaking Sought Comment on Whether to Reclassify Broadband Under Title II

In the wake of the D.C. Circuit’s ruling, FCC Chairman Wheeler proposed new rules based on the agency’s Section 706 authority, which sparked an immediate and widespread backlash. Many expressed concern that this approach would allow Internet service providers to speed up or slow down traffic to certain websites. They claimed that allowing these types of “Internet fast lanes” was antithetical to an open Internet.

The FCC then adopted a Notice of Proposed Rulemaking that proposed rules to prevent blocking or discriminating against consumers and entrepreneurs online.⁵ The FCC asked for input on whether it should allow pay-for-priority schemes—often called paid prioritization or fast lanes—or whether they should be banned outright. The Commission also asked whether it

² Federal Communications Commission, *Preserving the Open Internet, Broadband Industry Practices*, GN Docket No. 09-191 and WC Docket No. 07-52, *Report and Order* (Dec. 2010).

³ Telecommunications Act of 1996, Section 706.

⁴ *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

⁵ Federal Communications Commission, *Protecting the Open Internet*, GN Docket No. 14-28, *Notice of Proposed Rulemaking* (May 2014).

should adopt rules using its authority under Section 706, or reclassify broadband as a “telecommunications service” that could be regulated under Title II.⁶

ii. Public Input on Open Internet Proceeding

Consumer groups, technology companies, Members of Congress—as well as nearly four million individual Americans—contacted the FCC expressing their fear that rules imposed under Section 706 would not adequately protect the openness of the Internet. Many of these commenters pointed to Title II as a stronger foundation for new rules. They urged the FCC to reclassify broadband as a “telecommunications service,” which would allow the FCC to enforce a stronger nondiscrimination rule.

iii. Administration Support for Strong Open Internet Rules

In November 2014, President Obama urged the FCC to adopt strong, bright-line net neutrality rules based on Title II.⁷ The President endorsed four rules that would apply to both wired and wireless broadband services: (1) a no blocking rule so that a broadband provider could not stop its customers, for example, from watching a video online; (2) a no throttling rule so that a broadband provider could not slow down or degrade the quality of broadband Internet access traffic; (3) increased transparency to ensure that discrimination against content or services does not occur at points of interconnection, which is the place along a network where a broadband provider hands off traffic to connect to the rest of the Internet; and (4) a ban on paid prioritization to prevent special deals from being struck between broadband operators and websites for faster Internet lanes and to keep the Internet a level playing field for competition.

II. 2015 FCC NET NEUTRALITY RULES

A. Specific Rules Prohibiting Blocking, Throttling, Paid Prioritization, and Enhanced Transparency Rules

The FCC adopted a new set of rules on February 26, 2015, that were designed to protect consumers, free expression, and innovation online. The rules, which apply to both wired and wireless broadband services, are:

- (1) *no blocking*—broadband access providers are prohibited from stopping consumers from accessing content online;

⁶ The term “telecommunications service” means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used. 47 U.S. Code § 153.

⁷ The White House, *President Obama Urges FCC to Implement Stronger Net Neutrality Rules* (Nov. 10, 2014) (online at www.whitehouse.gov/blog/2014/11/09/president-obama-urges-fcc-implement-stronger-net-neutrality-rules).

- (2) *no throttling*—broadband access providers cannot slow down or degrade the quality of online content such as streaming videos; and
- (3) *no paid prioritization*—broadband access providers cannot cut special deals for Internet fast lanes, which would undercut a level playing field for competition.

The FCC also enhanced its existing rules for transparency and adopted rules that prevent broadband access providers from unreasonably interfering with or unreasonably disadvantaging consumers' access to the content of their choice. Finally, the FCC announced that it will also take enforcement action to ensure that discrimination against content or services does not occur at points of interconnection, which are those places along its network where a broadband provider hands off traffic to connect to the rest of the Internet.

B. Reclassification Under Title II with Forbearance From Over 700 Regulations

The FCC rooted its decision, following remand by the DC Circuit appeals court in multiple sections of the Communications Act. Most significantly, the order classifies broadband service as a telecommunications service under Title II of the Communications Act. At the same time, the FCC recognized that many aspects of Title II are not relevant or needed to preserve access, competition, and availability of many broadband services. The FCC, therefore chose not to apply (i.e., forbearance) over 700 some regulations that could potentially apply given the reclassification of broadband under Title II, including rate regulation, tariffing, and last-mile unbundling provisions. The FCC did maintain, however, several key Title II provisions for broadband including those that protect consumer privacy, access for people with disabilities, and universal service.

C. Congressional Response After Adoption of New Net Neutrality Rules

After President Obama made his announcement, Republican leadership of the Energy and Commerce Committee and the Senate Commerce Committee released their own legislative discussion draft, proposing to codify some of the network neutrality principles. The draft also proposed to strip the agency of nearly all its existing authority over broadband providers.

Shortly after the FCC adopted the new network neutrality rules, Rep. Blackburn introduced H.R. 1212, a bill to overturn the protections adopted by the Commission. H.R. 1212 would further block the FCC from issuing new or revised consumer protections for the open Internet. Additionally, Congressional Review Act disapproval resolutions (H. J. Res. 42 and S. J. Res. 14) were introduced on April 13, 2015 and April 28, 2015, respectively.

The House Appropriations Committee favorably reported H.R. 2995 to the House on June 17, 2015, but it has not been scheduled for consideration on the House floor. The bill includes language prohibiting the FCC from using any funds to implement or enforce the Open Internet rules until the pending court cases are resolved.⁸

⁸ H.R. 2995.

D. Effective Date and Current Status of Court Proceedings

The FCC's rules went into effect on June 12, 2015, after the U.S. Court of Appeals for the D.C. Circuit denied a stay request filed by US Telecom.⁹ The broader court challenge filed by US Telecom and other parties remains pending in the D.C. Circuit. Briefs have been filed, with oral arguments scheduled for December 4, 2015.

III. ECONOMIC IMPACT OF THE 2015 NET NEUTRALITY RULES

The D.C. Circuit Court of Appeals affirmed in 2014 that, without strong net neutrality rules, “broadband providers represent a threat to Internet openness and could act in ways that would *ultimately inhibit the speed and extent of future broadband deployment.*”¹⁰ Similarly, in its Protecting and Promoting the Open Internet Order, the FCC found that “the remarkable increases in investment and innovation seen in recent years—while the [Commission’s net neutrality] rules were in place—bear out the” view that broadband deployment is not hurt by the rules.¹¹

Longtime network neutrality opponents have recently claimed that a column published in Forbes is evidence that broadband capital expenditures have decreased since the FCC promulgated the most recent Open Internet Order.¹² The column cites a handful of announcements from Internet Service Providers to support a conclusion that broadband related capital expenditures declined during the first half of 2015.¹³

Many others have disputed that the anecdotes in the Forbes column can be used to support this kind of broad conclusion. For instance, they explained that AT&T itself said that its reduction in capital expenditures should be attributed to its successful conclusion of a long-term investment initiative.¹⁴ They note that in 2012—well before the FCC was contemplating

⁹ *D.C. Circuit Denies Stay, Open Internet Rules Become Effective June 12*, CommLaw Monitor (June 12, 2015) (online at www.commlawmonitor.com/2015/06/articles/uncategorized/d-c-circuit-denies-stay-open-internet-rules-become-effective-june-12/).

¹⁰ *Verizon v. FCC*, 740 F.3d 623, 646 (D.C. Cir. 2014) (emphasis added).

¹¹ Protecting and Promoting the Open Internet Order at ¶ 76.

¹² *Does The Tumble In Broadband Investment Spell Doom For the FCC’s Open Internet Order?* Forbes (Aug. 25, 2015) (online at www.forbes.com/sites/halsinger/2015/08/25/does-the-tumble-in-broadband-investment-spell-doom-for-the-fccs-open-internet-order/2/).

¹³ *Id.*

¹⁴ *A Reminder Why the Quello Center Net Neutrality Impact Study is Important*, Quello Center (Sept. 5, 2015) (citing AT&T CFO, John Stephens) (online at <http://quello.msu.edu/a-reminder-why-the-quello-center-net-neutrality-impact-study-is-important/>) [hereinafter Quello Center].

reclassifying broadband—AT&T outlined its plans to increase spending over a three year period, but that it would be “returning to normal levels in 2015.”¹⁵ Additionally, AT&T has in fact touted that its recently approved merger with DirecTV will allow it to expand its investment in fiber-to-the-premises service.¹⁶

Those that have analyzed the claims in the Forbes column have commented that it overlooks data that would undermine its conclusions. Specifically, wireless capital expenditures at T-Mobile, Sprint, and Verizon are up in the time period being evaluated.¹⁷

Further, cable companies have increased their actual network spending this year (excluding spending on set-top boxes).¹⁸ For example, Comcast has stated that it is continuing on its plan to roll out a new product offering two gigabit service to 18 million homes by the end of the year, regardless of the fact the FCC denied its proposed merger with Time Warner Cable and adopted new net neutrality rules.¹⁹ Comcast Cable President and CEO Neil Smit, in speaking to investors and analysts about Title II regulations stated, “it really hasn’t affected the way we have been doing our business or will do our business.”²⁰ Additionally, Charter Communications has vowed to continue investment in broadband as part of its proposed merger with Time Warner Cable, saying it will invest “at least \$2.5 billion to expand its lines to commercial areas in its current systems to ‘create additional, much-needed competition’ for telephone companies that serve business customers.”²¹

¹⁵ AT&T, *AT&T to Invest \$14 Billion to Significantly Expand Wireless and Wireline Broadband Networks, Support Future IP Data Growth and New Services* (Nov. 7, 2012) (press release) (online at www.att.com/gen/press-room?pid=23506&cdvn=news&newsarticleid=35661&mapcode).

¹⁶ See Chris Morran, *AT&T Claims That DirecTV Merger Will Allow It To Expand GigaPower Fiber Network*, *Consumerist* (Apr. 23, 2015) (online at <http://consumerist.com/2015/04/23/att-claims-that-directv-merger-will-allow-it-to-expand-gigapower-fiber-network/>).

¹⁷ Free Press, *The Truth About ISP Industry Investment After the FCC Net Neutrality Vote* (Sept. 10, 2015) (online at www.freepress.net/resource/107129/truth-about-isp-industry-investment-after-fcc-net-neutrality-vote).

¹⁸ *Id.*; see also Quello Center, *supra* note 12.

¹⁹ *After Blowing \$336 Million On Failed Merger, Comcast Again Proves New Neutrality Rules Won’t Harm Broadband Investment*, *Techdirt* (May 5, 2015) (online at www.techdirt.com/blog/netneutrality/articles/20150504/07403430884/after-blowing-336-million-failed-merger-comcast-again-proves-new-neutrality-rules-wont-harm-broadband-investment.shtml).

²⁰ *Id.*

²¹ *Charter Vows to Invest in Broadband and Jobs If It Gets Time Warner Cable*, *Deadline* (June 25, 2015) (online at <http://deadline.com/2015/06/charter-invest-broadband-jobs-time-warner-cable-1201455828/>).

As far as Committee staff is aware, no formal or peer-reviewed economic study has been conducted on the economic impact of the FCC's net neutrality rules. In fact, some economists have stated that it is likely too early to conduct such a study.²²

IV. WITNESSES

The following witnesses have been invited to testify:

Nicholas Economides
Professor of Economics
Stern School of Business
New York University

Frank Louthan
Managing Director- Equity Research,
Raymond James Financial

Michael Mandel
Chief Economic Strategist
Progressive Policy Institute

Robert Shapiro
Co-Founder and Chairman
Sonecon LLC

²² Quello Center, *supra* note 12.