

ONE HUNDRED FOURTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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WASHINGTON, DC 20515-6115

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MEMORANDUM

January 17, 2015

To: Subcommittee on Communications and Technology Democratic Members and Staff
Fr: Committee on Energy and Commerce Democratic Staff
Re: Subcommittee Hearing on “Protecting the Internet and Consumers Through Congressional Action.”

On Wednesday, January 21, 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 “Protecting the Internet and Consumers Through Congressional Action.” The hearing will discuss a legislative proposal drafted by the majority designed to codify some of the principles of network neutrality while removing sources of authority for the Federal Communications Commission (FCC) to regulate broadband providers.

I. BACKGROUND

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 treats 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 The FCC regulates information services, which currently includes broadband Internet access service, using ancillary authority found in Title I of the Act.

¹ Telecommunications Act of 1996, Section 151.

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 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 and to contest whether the FCC even had legal authority to regulate broadband services. In *Verizon v. FCC* (2014), the D.C. Circuit Court of Appeals affirmed that the FCC has authority to regulate broadband under Section 706 of the 1996 Telecommunications Act. In that section of the Act, Congress directs the FCC to encourage the deployment of broadband telecommunications capability. But in the same decision, the court threw out the FCC's bans on blocking and discrimination. The court reasoned that those two rules were a type of common carrier regulation that could not be applied to broadband services so long as the Commission continued to classify broadband as an information service.³

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.⁴ 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 should adopt rules using its authority under Section 706 or if it should reclassify broadband as a "telecommunications service" that could be regulated under Title II.

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.

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

⁴ Federal Communications Commission, *Protecting the Open Internet*, GN Docket No. 14-28, *Notice of Proposed Rulemaking* (May 2014).

In November 2014, President Obama urged the FCC to adopt strong, bright-line net neutrality rules based on Title II.⁵ 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 from watching a video online; (2) a no throttling rule so that a broadband provider could not slow down or degrade the quality of a streaming video; (3) increased transparency to ensure that discrimination against content or services does not occur at points of interconnection, the place 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 for Internet fast lanes and to keep the Internet a level playing field for competition.

FCC Chairman Wheeler has scheduled an FCC vote on net neutrality rules at the end of February 2015. Chairman Wheeler has suggested in public remarks that his draft will include rules based on the FCC's authority under Title II of the Act. But he has also said that he would forebear from many of the common carrier regulations under that title—most notably that he would forebear from rate regulation.⁶ Senator Thune and Rep. Upton recently released a legislative proposal to “prohibit blocking and throttling” and “ensure that Internet service providers cannot charge a premium to prioritize content delivery.”⁷

II. WITNESSES

The following witnesses have been invited to testify:

Michael K. Powell

President and CEO

National Cable & Telecommunications Association

Meredith Baker

President and CEO

CTIA – The Wireless Association

Chad Dickerson

Chief Executive Officer

Etsy

⁵ 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).

⁶ Washington Post, *FCC chair has all but confirmed he'll side with Obama on net neutrality* (Jan. 7, 2015) (online at www.washingtonpost.com/blogs/the-switch/wp/2015/01/07/the-fcc-has-all-but-confirmed-itll-side-with-obama-on-net-neutrality/).

⁷ Reuters, *Congressional proposal offers Internet rules of the road* (Jan. 14, 2015) (online at <http://blogs.reuters.com/great-debate/2015/01/14/congressional-proposal-offers-internet-rules-of-the-road/>).

Dr. Nicol Turner-Lee

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