



**Testimony of
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Before the

**United States House of Representatives
Committee on Energy and Commerce
Subcommittee on Communications and Technology**

Regarding

**Protecting the Internet and Consumers Through Congressional Action
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SUMMARY

Protecting the openness of the Internet and promoting broadband policies that protect consumers and drive our economy are issues of the utmost importance to our future prosperity as a country. Internet access has become a necessity – allowing all people to share their stories, engage in our democracy, participate in our economy, and become better-informed members of our society.

While the Federal Communications Commission (FCC) and Congress each have an important role to play in protecting consumers and the Internet, I humbly request that, in this instance, Congress allow the FCC to complete its rulemaking and retain the ability to exercise its ample existing authority over two-way communications platforms, such as broadband Internet access service, under Title II of the Communications Act. This is the surest and swiftest way to ensure that consumers and the Internet are protected.

Although Congress plays an important role in development and oversight of broadband policy, the discussion draft suffers from a number of fatal flaws that could permanently debilitate the FCC and lead to disastrous unintended consequences. Among the flaws, the discussion draft blesses some forms of discrimination and strips the FCC of authority that could be used to achieve shared policy goals, such as universal service, rural access, accessibility for persons with disabilities, public safety, consumer privacy, and others. Further, the discussion draft contemplates enforcement through a difficult process that disadvantages consumers and small businesses, and opens loopholes that threaten to swallow its rules.

Beyond that, concerns about Title II action that appear to influence this legislative effort are misplaced. Rules based on Title II authority, with appropriate forbearance, will not impede investment, create new taxes, slow broadband adoption, or create additional litigation risk.

INTRODUCTION

Chairman Walden, Ranking Member Eshoo, and esteemed members of the subcommittee, thank you for inviting me to testify this morning on how to best protect the Internet and consumers. My name is Jessica González, and I am the Executive Vice President & General Counsel of the National Hispanic Media Coalition (NHMC), a media advocacy and civil rights organization for the advancement of Latinos, working towards a media that is fair and inclusive of Latinos, and towards universal, affordable, and open access to communications. I am especially pleased to testify here today concerning the Open Internet, which is a crucial tool for all people to share their stories, engage in our democracy, participate in our economy, and become better-informed members of our society.¹

I am so pleased that members on both sides of the aisle are recognizing the pervasive threat that practices such as blocking, throttling, and paid prioritization pose to the American people and our economy. The legislation under consideration today proposes that Internet Service Providers (ISPs) be held to *per se* common carrier obligations to mitigate this threat. The bipartisan identification of network neutrality violations as serious issues with serious implications is a tremendous step forward in this debate, and reflects the widespread concern echoed in all corners of the nation from people of all ages, colors and political affiliations.

However, respectfully, it is neither prudent nor necessary to pursue congressional action at this time at the expense of the Federal Communications Commission's (FCC) ongoing process. Therefore, I request that Congress allow the FCC to follow the path that it is reportedly on to exercise its existing Title II authority, complete its comprehensive rulemaking process, and impose bounded and light-touch Open Internet rules in the coming weeks. FCC action is the

¹ I would like to thank my colleagues, Michael Scurato and Elizabeth Ruiz, for assisting me with this testimony.

most direct, informed, and certain path to ensuring that individuals and businesses have their rights firmly protected online without additional and unnecessary delay or a prolonged political battle.

Should Congress elect to pursue legislation on this issue, I oppose much of the language in the discussion draft that was circulated last week. On one hand, the draft seeks to implement a number of *per se* common carrier requirements that are favored by the vast majority of millions of FCC commenters by prohibiting blocking of lawful content or devices as well as paid prioritization and throttling. However, due to the limited nature of prohibitions listed and effects of various other provisions, the draft as circulated would represent a seismic telecommunications policy shift with repercussions far beyond the Open Internet debate. It would strip our country's expert communications agency of authority to protect consumers on the communications platform of the 21st century and pour cement on the still vast digital divide. It would offer consumers limited and inferior protections to FCC rules crafted under Title II, needlessly jeopardize past and future policymaking designed to promote broadband access and adoption, disempower consumers and create uncertainty by relying on an onerous and time consuming adjudication process, and create dangerous loopholes that threaten to swallow the useful prohibitions that the draft contains.

I. Allowing The FCC To Complete Its Rulemaking Is The Swiftest And Surest Path To Protecting Consumers And The Internet.

The FCC appears willing and able to complete its Open Internet rulemaking in the coming weeks to implement new protections for consumers and the Internet based on the most extensive record collected in the history of the agency. Allowing the Commission to utilize its existing authority to complete its process is the best way to provide consumers and businesses with new, well-vetted protections while avoiding further delay.

A. The Commission Is Poised To Implement New Protections In The Coming Weeks After Compiling And Analyzing An Extensive Record.

When the FCC acts to implement Open Internet rules on February 26 of this year, 408 days will have passed since the D.C. Circuit Court of Appeals vacated key provisions of the FCC's previous Open Internet Order – provisions that prevented blocking and unreasonable discrimination online – which represent the core of what is required to preserve an Open Internet.² That is 408 days of consumers, businesses, and entrepreneurs cautiously utilizing the Internet without the protections that they require.

However, it also represents 408 days of intensive FCC commitment to analyze relevant judicial decisions, reflect on its statutory authority, explore workable proposals, develop a vast record by soliciting and reviewing input from millions of members of the public and hundreds of interested stakeholders and experts, perform its own research and analysis and, ultimately, draft and implement sound and enforceable rules. It represents thousands of hours of work for dozens of dedicated staff members – and likely much more if we consider the FCC's development of its Open Internet expertise over the better part of the past decade. Although it is unfortunate that 408 days will have passed without enforceable protections, this process is often the best and only way to deal with a complex collection of industries and evolving technology. This is democracy at work and it demonstrates the value of expert agencies.

B. The Commission Has Ample Existing Authority To Protect Consumers And The Internet, And Achieve Other Important Policy Goals, Under Title II.

Beyond the favorable timing of FCC action, the Commission has ample authority to adopt strong and enforceable Open Internet rules and does not require a more explicit grant of

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

authority from Congress to protect consumers. Decisions by the Supreme Court in *National Cable and Telecommunications Ass’n v. Brand X Internet Services* and *Fox Television Stations v. FCC* granted deference to the FCC to periodically revisit classification decisions and policies as needed.³ As the Court held in *Brand X*, “[The Communications Act] leaves federal telecommunications policy in this technical and complex area to be set by the [FCC].”⁴ As the expert agency on telecommunications issues, the FCC is even permitted to reverse its own policies: “For if the agency adequately explains the reasons for a reversal of policy, ‘change is not invalidating, since the whole point...is to leave the discretion provided by the ambiguities of a statute with the implementing agency.’”⁵ Further, in *Fox* the Court explained, “[The agency] need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better.”⁶ The FCC has the authority to reclassify broadband Internet access service (BIAS) and achieve the common carrier rules long thought to be necessary to protect consumers and clearly favored in the discussion draft.

Once the FCC applies the correct, “telecommunications service” classification to BIAS, it can take advantage of the authority contained in Title II to meet and often exceed the apparent objectives of the discussion draft. It can assert authority under Sections 201 and 202 of the Communications Act to ensure that “all charges, practices, classifications, and regulations ...

³ *National Cable and Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967 (2005); *Fox Television Stations v. FCC*, 556 U.S. 502 (2009).

⁴ *Brand X Internet Services*, 545 U.S. at 992 (2005).

⁵ *Id.* at 981.

⁶ *Fox Television Stations v. FCC*, 556 U.S. 502, 503 (2009) (emphasis in original).

shall be just and reasonable” and prohibit “unjust and unreasonable discrimination.”⁷ It can utilize that authority to define certain practices, like paid prioritization and throttling as mentioned in the discussion draft, as *per se* unreasonable. It can implement the complaint process found in Section 208, which places on the burden on the defendant to “establish[] that the discrimination is justified and, therefore, not unreasonable” – not on the aggrieved consumer or business.⁸ These provisions are absolutely necessary to adequately protect the Open Internet.

However, changing the classification of BIAS would allow the Commission to do more than just meet the protections for consumers and innovators that are contemplated by the discussion draft. It would allow the Commission to explore novel ways to promote a number of other important policy goals favored by members of this subcommittee, as well as NHMC and many of its allies. Section 254 could put the FCC on stronger footing as it strives for Universal Service by granting it the latitude to add new tools to its tool kit to address broadband access and adoption disparities in rural and low-income communities, including communities of color.⁹ The application of Section 222 could be a win for consumer privacy and cybersecurity by requiring broadband providers to protect certain confidential information that they receive from consumers.¹⁰ Section 255 could ensure better access to broadband for individuals with disabilities, helping to close yet another digital divide in this country.¹¹ Section 224 could be a boon to competition by permitting new entrants like Google Fiber to use important infrastructure

⁷ 47 U.S.C. § 201(b) (2013); 47 U.S.C. § 202 (2013).

⁸ *Beehive Telephone, Inc. v. Bell Operating Companies*, Memorandum Opinion and Order, 10 FCC Rcd. 10562, ¶ 27 (1995) (vacated and remanded on other grounds by *Beehive Telephone, Inc. v. FCC*, No. 95-1479 (1996)); *Ad Hoc Telecommunications Users Committee v. FCC*, 680 F.2d 790, 792 (D.C. Cir. 2013).

⁹ 47 U.S.C. § 254.

¹⁰ *Id.* at § 222.

¹¹ *Id.* at § 255.

to facilitate build out.¹² Many of these provisions would not apply automatically upon a change in classification. The Commission could and should choose to move ahead with implementing Open Internet protections and then consider further application of important Title II provisions.

In addition to considering which provisions of Title II to apply to BIAS, the Commission has the legal authority to refrain from applying certain provisions through forbearance. Section 10 of the Telecommunications Act enables the flexible application of FCC authority to evolving markets and technologies by allowing the Commission to “forbear from applying any regulation or any provision ... to a telecommunications carrier ... or service.”¹³ The Commission can forbear if it finds that enforcement of a provision is: (1) “not necessary to ensure that the charges, practices, classifications, or regulations ... are just and reasonable and are not unjustly or unreasonably discriminatory”; (2) “not necessary for the protection of consumers”; and (3) “forbearance from applying such a provision or regulation is consistent with the public interest.”¹⁴ Even the most strident Open Internet activists agree that there are a number of provisions of Title II that need not apply, such as onerous tariffing requirements.

II. The Substance Of The Discussion Draft Suffers From Fatal Flaws That Prevent Its Provisions From Adequately Protecting Consumers Or The Internet And Foreclose The FCC From Addressing Other Policy Goals.

The discussion draft considered at this hearing suffers from numerous flaws that, unfortunately, make it an inferior vehicle for protecting consumers and the Internet compared to FCC action under Title II.

¹² *Id.* at § 224; Notice of *Ex Parte* filed by Google Inc., GN Docket No. 14-28 (Dec. 30, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=60001011462>.

¹³ 47 U.S.C. § 160 (2013).

¹⁴ *Id.*

A. The Discussion Draft Permits Unreasonable Discrimination And Strips The FCC Of Authority To Address Potentially Harmful Practices That Threaten The Open Internet.

The discussion draft, as circulated, prohibits BIAS providers from “block[ing] lawful content, applications, or services,” “us[ing] non-harmful devices,” or “throttl[ing] lawful traffic” all “subject to reasonable network management.”¹⁵ It also prohibits “paid prioritization.”¹⁶ NHMC opposes all of these practices and appreciates the discussion draft’s recognition that these *per se* common carrier provisions are necessary to protect consumers and the Internet. However, this list does not represent the entirety of practices that could be deemed harmful to consumers and the Open Internet. By prohibiting only this finite list of practices – blocking, throttling, and paid prioritization – and failing to include a provision that parallels Section 202, allowing the FCC to confront unjust and unreasonable discrimination, the discussion draft effectively permits any current or future practices that can be considered unreasonably discriminatory so long as they do not fall under any of the proscribed categories. Although this outcome surely cannot be desired, the language of the discussion draft requires it.

The discussion draft further strips the FCC of any ability to “expand the Internet openness obligations” contained therein “whether by rulemaking or otherwise.”¹⁷ This provision prevents the FCC from addressing the shortcomings inherent in failing to account for other forms of unreasonable discrimination and, effectively, freezes the FCC in time, only allowing it to ever confront a small handful of harmful practices that we have contemplated based on market conditions and technologies that exist today. This would be a step in the wrong direction. Even a more comprehensive list of harmful practices that could include potential misuse of data caps or

¹⁵ H.R. ___, 114th Cong. § 13(a)(1)-(3) (2015) *available at* <http://docs.house.gov/meetings/IF/IF16/20150121/102832/BILLS-114pih-NetNeutrality.pdf>.

¹⁶ *Id.* at § 13(a)(1)(4).

¹⁷ *Id.* at § 13(b)(1).

issues occurring at interconnection points, among others, would eventually become woefully outdated should the FCC be stripped of its ability to respond to current conditions and practices.

B. The Discussion Draft Prevents The FCC From Pursuing Important Policy Goals And Further Protecting Broadband Users By Permanently Classifying Broadband Internet Access Service As An Information Service And Stripping The FCC Of Its Section 706 Authority.

Far beyond simply tying the Commission's hands to confront present and future threats to Internet openness, the language in the discussion draft calls into question the role of the FCC in the future of broadband policy and consumer protection, with the exception of the narrow Open Internet protections contained therein. By making permanent the "information service" classification, the draft forecloses the FCC from exploring the use of Title II authority to address broadband universal service goals, privacy, accessibility for persons with disabilities, interconnection, network reliability, and a number of other important policy goals identified explicitly in the statute.

Further, foreclosing Title II in tandem with stripping Section 706 authority unravels a half-decade of work by the Commission to ensure that broadband is deployed to rural areas in a timely manner. Additionally, as Public Knowledge has explained:

[This draft] would eliminate the FCC's authority to preempt limits on community broadband. It could have serious unintended impacts on voice-over-IP services, placing the stability of the 9-1-1 system at risk and interfering with the FCC's efforts to resolve rural call completion. Among other things, it could also limit the FCC's authority to promote access by the disabled to communications services, protect consumer privacy, promote broadband deployment by ensuring that new competitors have access to utility poles and rights of way.¹⁸

¹⁸ Shiva Stella, "Public Knowledge Expresses Strong Concerns About Sen. Thune's Net Neutrality Discussion Draft," *Public Knowledge*, (Jan. 16, 2015), <https://www.publicknowledge.org/press-release/public-knowledge-expresses-strong-concerns-about-sen.-thunes-net-neutrality-discussion-draft>.

The extent that this draft proposes to eliminate the FCC’s authority is so severe that it would all but ensure that the United States will have no expert agency implementing broadband policy for the foreseeable future. As our nationwide communications networks shift to broadband technology in the coming years, this abdication of power could have immense unintended consequences on innovation in this country and our economy as a whole.

At best, the provisions of the discussion draft would leave the FCC grasping for ancillary authority as it attempts to respond to an ever-changing marketplace – an exercise that, to this point, has been largely unsuccessful and fostered tremendous uncertainty.¹⁹ The Commission’s ancillary authority permits it to “perform any and all acts...not inconsistent with this chapter [of the Communications Act], as may be necessary in the execution of its functions.”²⁰ During the past 45 years, however, courts have substantially limited the FCC’s ability to act on its ancillary jurisdiction.²¹ Significantly, in *Comcast v. FCC*, the FCC unsuccessfully argued it had ancillary authority to regulate ISPs’ network management practices. The Court emphasized that the FCC’s reliance on ancillary authority must be in furtherance of “statutorily mandated responsibilities.”²² Further, in *Echostar Satellite, LLC v. FCC*, the D.C. Circuit Court noted even under the agency-friendly *Chevron* standard of review, the FCC will not receive deference as to its own interpretation of the scope of its ancillary jurisdiction because “*Chevron* [deference] only applies in instances in which Congress has delegated an agency authority to regulate the area at issue.”²³ By removing, rather than clarifying, potential sources of FCC authority to make any meaningful

¹⁹ *Comcast Corp. v. FCC*, 600 F.3d 642, 651-58 (D.C. Cir. 2010).

²⁰ *Comcast Corp.*, 600 F.3d at 646 (quoting 47 U.S.C. § 154(i)).

²¹ *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (*Midwest Video I*); *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (*Midwest Video II*).

²² *Comcast Corp.*, 600 F.3d at 644, 661.

²³ *Echostar Satellite, LLC v. FCC*, 704 F.3d 993, FN 3 (D.C. Cir. 2013).

broadband policy, it seems that this discussion draft leaves little to which the agency could claim ancillary authority. Therefore, the discussion draft leaves the FCC with uncertain authority, at best, and increases the litigation threat at its every attempt to protect consumers, encourage competition, or otherwise engage ISPs.

C. The Discussion Draft Disempowers Consumers By Relying On Case-By-Case Adjudication For Enforcement.

The discussion draft dictates that the Commission “enforce the obligations established ... through adjudication of complaints alleging violations.”²⁴ This provision appears to put the burden on consumers and aggrieved parties to identify, report, and litigate violations of Internet openness. The draft also appears to foreclose the FCC from action upon its own motion to pursue violations. This regime will be ineffective as most likely victims of harmful practices – consumers, independent content producers, as well as startup web companies and small businesses – will largely lack either the technical expertise to identify violations and their source, the legal expertise to pursue successful enforcement, or both. Startup web companies, in particular, made this point clearly and consistently in the FCC’s docket.²⁵ Even if an aggrieved

²⁴ H.R. ___, 114th Cong. § 13(b)(1) (2015) *available at* <http://docs.house.gov/meetings/IF/IF16/20150121/102832/BILLS-114pih-NetNeutrality.pdf>.

²⁵ Notice of *Ex Parte* filed by Marvin Ammori, GN Docket No. 14-28, fn. 1 (Dec. 19, 2014) *available at* <http://apps.fcc.gov/ecfs/document/view?id=60001010553>, (citing Comments of Y Combinator, GN Docket No. 14-28, July 14, 2014, at 3, *available at* <http://apps.fcc.gov/ecfs/document/view?id=7521383177> (“No startup has the funds 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.”); Comments of Tumblr, GN Docket No. 14-28, Sept. 9, 2014, at 10, *available at* <http://apps.fcc.gov/ecfs/comment/view?id=6018347452>; Comments of Reddit, GN Docket No. 14-28, July 15, 2014, at 8, *available at* <http://apps.fcc.gov/ecfs/document/view?id=7521679127>; Comments of Meetup, GN Docket No. 14-28, July 14, 2014, at 8, *available at* <http://apps.fcc.gov/ecfs/document/view?id=7521382127>; Notice of *Ex Parte* from Gigi Sohn, Special Counsel for External Affairs, Office of Chairman Tom Wheeler, GN Docket No. 14-28, July 16, 2014, *available at* <http://apps.fcc.gov/ecfs/document/view?id=7521633973>; Comments of Vimeo, GN Docket No. 14-28, July 15, 2014, at 14-15, *available at*

party is able to muster up enough expertise, time, and resources to initiate an enforcement action, it would then find itself contending with an ISP opponent likely to have substantial resources and an army of telecom attorneys at its disposal. This dynamic would make the successful prosecution of a complaint highly unlikely. For these reasons, the enforcement regime contemplated in this draft would leave the vast majority of consumers no better off than if they had no protections at all.

D. The Discussion Draft Opens Loopholes To Its Own Limited Provisions
Rendering It Ineffective To Protect Consumers And The Internet.

The discussion draft contains significant loopholes that threaten to swallow its rules and could jeopardize the upkeep of the public Internet by providing ISPs greater leeway to explore “specialized services.”

The discussion draft defines “specialized services” as “services other than broadband Internet access service that are offered over the same network as, and that may share network capacity with, broadband Internet access service.”²⁶ The only restrictions placed on “specialized services” is that they “may not be offered or provided in ways that threaten the meaningful availability of broadband Internet access service or ... have been devised or promoted in a manner designed to evade the purposes” of the draft.²⁷ This definition goes beyond the limited use cases that are utilized today, such as ISP-provided IPTV or VOIP services. Further, it surpasses the finite examples provided by President Obama, who envisioned “dedicated” hospital

<http://apps.fcc.gov/ecfs/document/view?id=7521394546>; and comments of dozens of other startups).

²⁶ H.R. ___, 114th Cong. § 13(g)(3) (2015) *available at*

<http://docs.house.gov/meetings/IF/IF16/20150121/102832/BILLS-114pih-NetNeutrality.pdf>.

²⁷ *Id.* at § 13(d)(2).

networks,²⁸ and the FCC, which contemplated connectivity of certain devices such as “e-readers, heart monitors, or energy consumption sensors, to the extent the service relates to the functionality of the device.”²⁹

By allowing “specialized services” to share network capacity with BIAS and only limiting their use if they “threaten meaningful availability” of BIAS, the draft incentivizes ISPs to heavily invest in premium, proprietary services that could be sold over their networks for those who can afford them while maintaining only “meaningful availability” of BIAS for standard subscribers. In theory, this scenario could pose a larger threat to Internet openness than paid prioritization or throttling by allowing ISPs to diminish or freeze the amount of network capacity dedicated to BIAS while creating a new and, perhaps, unforeseen suite of high-bandwidth services for premium customers.

III. The Title II Concerns That Appear To Be Motivating Congressional Action Are Misplaced.

Numerous press reports and statements from members of this committee and subcommittee as well as the committee of jurisdiction in the Senate, indicate that concerns related to the prospect of the FCC concluding its ongoing rulemaking by exercising its Title II authority are motivating congressional action in this case.³⁰

²⁸ President Barack Obama, Statement by the President on Net Neutrality (Nov. 10, 2014) *available at* <http://www.whitehouse.gov/the-press-office/2014/11/10/statement-president-net-neutrality>.

²⁹ *In re Preserving the Open Internet*, 25 FCC Rcd. 17905, ¶¶ 47, 112-114 (2010) *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A1_Rcd.pdf.

³⁰ John Thune and Fred Upton, “Congressional proposal offers Internet rules of the road,” *Reuters* (Jan. 14, 2015) *available at* <http://blogs.reuters.com/great-debate/2015/01/14/congressional-proposal-offers-internet-rules-of-the-road/>; Republican Press Office, “Congressional Leaders Unveil Draft Legislation Ensuring Consumer Protections and Innovative Internet: Legislation to be the Focus of House and Senate Hearings Next Week,” U.S. Senate Committee on Commerce, Science, & Transportation (Jan. 16, 2015) *available at*

A. The Application Of Title II With Forbearance Will Not Impact ISPs' Investment Levels.

In a recent press release, congressional leaders described one of the purposes of congressional action as “ensuring that innovation and investment continue to fuel the robust future of the Internet” in part, as Chairman Upton explained, by leaving behind “twentieth century utility regulation” found in Title II.³¹ However, the idea that the limited application of Title II that many Open Internet advocates favor would negatively impact investment by ISPs is unsupported by historical data and contradicted in statements that many ISPs have made to their investors and the Commission.³²

Historically, the application of Title II has not hampered investment or build-out. As Free Press succinctly explained in a recent FCC filing:

[It is a] historical fact that DSL availability went from zero to four out of every five U.S. homes while DSL was under Title II... [a] historical fact that [mobile] availability went from zero to 99.9 percent of the country while under Title II, with 93 percent of the U.S. covered by at least four Title II [mobile providers] ... [and a] historical fact that cable [companies] had their greatest period of network investment during the two years that followed the Ninth Circuit Court of Appeals' decision that classified cable modem as a Title II service.³³

This historic perspective helps makes sense of a slew of recent public statements from broadband company executives, assuring investors that the increasing palatability of rules based

http://www.commerce.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=982783dd-612b-418a-a92e-ef8eded4592e.

³¹ Republican Press Office, “Congressional Leaders Unveil Draft Legislation Ensuring Consumer Protections and Innovative Internet: Legislation to be the Focus of House and Senate Hearings Next Week (Jan. 16, 2015) *available at* http://www.commerce.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=982783dd-612b-418a-a92e-ef8eded4592e.

³² *See infra* FN 34.

³³ Notice of *Ex Parte* filed by Free Press, GN Docket No. 14-28, GN Docket No. 10-127 (Nov. 21, 2014) *available at* http://www.freepress.net/sites/default/files/resources/Free_%20Press_11-20-2014_ex_parte_USTA%20Investment%20Study_Final.pdf.

in Title II authority would do little to impact their investment decisions across the country.³⁴ Google, which offers its competitive Google Fiber service in a handful of markets, told the FCC that applying certain provisions of Title II could actually “promote competition and spur more investment and deployment of Internet service.”³⁵ Sprint should be commended for being the first major ISP to tell the Commission the truth about Title II and investment. In a recent filing, Sprint explained that it 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.”³⁶

These statements are also consistent with the current application of Title II to profitable services that many use today. For instance, Title II currently applies to Commercial Mobile Radio Services (CMRS), or mobile voice service, and many enterprise broadband services. In fact, in 2013, shortly before arguing that Title II “would ... impose barriers to broadband infrastructure investment” in the FCC’s Open Internet docket, AT&T told the Commission that

³⁴ See e.g., Brian Fung, “Verizon: Actually, strong net neutrality rules won’t affect our network investment,” *The Washington Post* (Dec. 10, 2014) available at <http://www.washingtonpost.com/blogs/the-switch/wp/2014/12/10/verizon-actually-strong-net-neutrality-rules-wont-affect-our-network-investment/>, (When asked how Title II reclassification would affect Verizon’s investment in the U.S., Francis J. Shammo, Verizon’s executive vice president and chief financial officer said, “I mean to be real clear, I mean this does not influence the way we invest. I mean we’re going to continue to invest in our networks and our platforms, both in Wireless and Wireline FiOS and where we need to. So nothing will influence that...I mean we were born out of a highly regulated company, so we know how this operates...”).

³⁵ Alistair Barr, “Google Strikes an Upbeat Note With FCC on Title II,” *Digits: Tech News & Analysis from the WSJ*, (Dec. 31, 2014) available at <http://blogs.wsj.com/digits/2014/12/31/google-strikes-an-upbeat-note-with-fcc-on-title-ii/?mg=blogs-wsj&url=http%253A%252F%252Fblogs.wsj.com%252Fdigits%252F2014%252F12%252F31%252Fgoogle-strikes-an-upbeat-note-with-fcc-on-title-ii> (citing Letter to FCC filed by Austin C. Schlick, Director of Communications Law at Google, Inc., GN Docket No. 14-28 (Dec. 30, 2014) available at <http://apps.fcc.gov/ecfs/document/view?id=60001011462>).

³⁶ Letter to Chairman Wheeler filed by Stephen Bye, Chief Technology Officer at Sprint, GN Docket No. 14-28 (Jan. 15, 2015) available at <http://apps.fcc.gov/ecfs/document/view?id=60001013965>.

the limited application of Title II³⁷ to its enterprise broadband service was an “unqualified regulatory success story ... represent[ing] the epicenter of the broadband investment that the Commission’s national broadband policies seek to promote.”³⁸

B. The Application Of Title II With Forbearance Will Not Lead To New Taxes Or Fees.

In a *Reuters* editorial that appeared shortly before the release of the discussion draft, Chairman Thune and Chairman Upton labeled Title II an “ill-fitting tool” for the task of protecting Internet openness that “could result in billions of dollars in higher government fees and taxes on consumers’ monthly broadband bills, according to a Progressive Policy Institute report.”³⁹ However, the report that Chairman Thune and Chairman Upton relied upon has been widely refuted and since been awarded three out of a possible four “Pinocchios” by the *Washington Post* “Fact Checker” for containing “significant factual errors and/or obvious contradictions.”⁴⁰

Among various errors and overstatements, the Progressive Policy Institute report inexplicably overlooked a key piece of federal law that is directly on point: the Internet Tax Freedom Act (ITFA). The ITFA, which has been in place since 2004 (with similar legislation in place even earlier) and was recently reauthorized, prevents state and local governments from

³⁷ Including key provisions such as 47 U.S.C. §§ 201, 202, 208, 222, 254, and 255.

³⁸ Comments of AT&T, WC Docket No. 05-25, RM-10593 at 3 (April 16, 2013) *available at* <http://apps.fcc.gov/ecfs/document/view?id=7022283535>.

³⁹ John Thune and Fred Upton, “Congressional proposal offers Internet rules of the road,” *Reuters* (Jan. 14, 2015) *available at* <http://blogs.reuters.com/great-debate/2015/01/14/congressional-proposal-offers-internet-rules-of-the-road/>.

⁴⁰ Michelle Ye Hee Lee, “Will the FCC’s net neutrality decision cost Americans \$15 billion in new taxes? Nope,” *The Washington Post* (Jan. 16, 2015) *available at* <http://www.washingtonpost.com/blogs/fact-checker/wp/2015/01/16/the-claim-that-fccs-net-neutrality-decision-would-cost-americans-15-billion-in-new-taxes/>; Glenn Kessler, “About The Fact Checker,” *The Washington Post* (last visited Jan. 19, 2015) *available at* http://blog.washingtonpost.com/fact-checker/2007/09/about_the_fact_checker.html#pinocchio (explaining The Fact Checker’s methodology for verifying sources).

imposing any new state or local taxes on Internet access. The definition of “Internet access” in the law, as well as the legislative history, makes it abundantly clear that Internet access is to be exempted from state and local taxes regardless of the platform used or the regulatory treatment of the service. Further, as the *Washington Post* pointed out, there is no indication that existing state fees on telephone service would actually apply to broadband service after a change in classification by the FCC.

C. The Application Of Title II With Forbearance Will Not Slow Broadband Adoption.

Another argument, closely related to those about investment or additional taxes, is that Title II will hamper broadband adoption, particularly in communities of color. Promoting policies to increase broadband adoption, especially within the Latino community and other communities of color, is one of NHMC’s core policy goals. Accordingly, this is an argument that NHMC has carefully vetted and dismissed.

Adherents to this argument reason that decreased investment by ISPs will disproportionately diminish access in lower income communities of color and that new taxes will increase overall cost and make broadband less affordable. However, as the investment and tax myths were dispensed with above, the idea that Title II would negatively impact broadband adoption is unsupported.

In addition to being unsupported by the facts, the idea that enforceable, common carrier Open Internet rules would discourage broadband adoption is counterintuitive. The Commission has stated many times, in reasoning accepted by the D.C. Circuit in *Verizon*, that Open Internet rules like the rules against blocking and unreasonable discrimination that it adopted in 2010 enable a “virtuous circle of innovation in which new uses of the network—including new content, applications, services, and devices—lead to increased end-user demand for broadband, which

drives network improvements, which in turn lead to further innovative network uses.”⁴¹ As the FCC rightly noted when it adopted its original Open Internet rules in 2010, rules against blocking and unreasonable discrimination “help close the digital divide by maintaining relatively low barriers to entry for underrepresented groups and allowing for the development of diverse content, applications, and services.”⁴²

Further, the argument ignores the authority the FCC could assert to pursue universal service goals under Title II. By embracing the solid legal footing afforded by classifying BIAS as a telecommunications service, the FCC could more easily modernize existing Universal Service Fund programs to address broadband affordability barriers and rural access problems. Taken together, Title II would give the FCC many of the tools that it needs to more comprehensively address the digital divide.

D. Preventing The FCC From Applying Title II With Appropriate
Forbearance Will Not Avoid Lengthy Court Battles Or Market
Uncertainty.

In recent days, many have asserted that moving forward with legislation instead of allowing the FCC to complete its rulemaking would avoid protracted litigation.⁴³ Unfortunately, given the litigious environment that currently exists in telecommunications sector, any attempt to preserve the Open Internet will likely end up in court, one way or another.

⁴¹ *In re Preserving the Open Internet*, 25 FCC Rcd. 17905, ¶ 14 (2010) available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A1_Rcd.pdf.

⁴² *Id.* at ¶ 18.

⁴³ Republican Press Office, “Congressional Leaders Unveil Draft Legislation Ensuring Consumer Protections and Innovative Internet: Legislation to be the Focus of House and Senate Hearings Next Week,” U.S. Senate Committee on Commerce, Science, & Transportation (Jan. 16, 2015) available at http://www.commerce.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=982783dd-612b-418a-a92e-ef8eded4592e.

The FCC's 2010 Open Internet rulemaking is a perfect example of the unpredictability of litigation. In the 2010 Open Internet Order, the FCC made every effort to respond to many of the concerns and proposals contained in the record. It exempted wireless carriers from having to comply with stronger rules, failed to issue a bright line prohibition of paid prioritization, left the door open for specialized services and reasonable network management and, above all else, declined to classify BIAS as a telecommunications service.⁴⁴ Interested parties from across the spectrum – wireless companies, cable providers, public interest groups, civil rights organizations, and Internet companies – accepted the FCC's efforts and embraced the rules as a reasonable, albeit imperfect, framework to build upon that provided much needed certainty to the sector.⁴⁵ However, despite widespread acceptance of what seemed an effective and hard won compromise, the American people were still subject to three years of litigation as Verizon successfully challenged the rules in court.

⁴⁴ *In re Preserving the Open Internet*, 25 FCC Rcd. 17905 (2010) available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A1_Rcd.pdf.

⁴⁵ See e.g., David L. Cohen, Executive Vice President and Chief Diversity Officer, "Comcast Supports the Open Internet," Comcast Voices (Sept. 10, 2014) available at <http://corporate.comcast.com/comcast-voices/comcast-supports-the-open-internet> ("Comcast has a history of supporting an open Internet. We publicly and strongly supported the FCC's 2010 Open Internet Order..."); Bob Quinn, "Banning Paid Prioritization within a Viable and Sustainable Framework," AT&T Public Policy Views & News (July 17, 2014) available at <http://publicpolicy.att.com/att-open-internet-policy-statement> ("AT&T also supported the FCC's 2010 rules, including the ones which were ultimately vacated by the Verizon court. We recognized then, and now, that those rules represented a purposeful and careful balance between ensuring the openness of the Internet and promoting the continued massive infrastructure investments necessary to deliver to American consumers the ever increasing amount of bandwidth needed..."); Andrew McDiarmid, "Court Strikes Down Open Internet Rules: What Now?" *Center for Democracy and Technology* (Jan. 14, 2014) available at <https://cdt.org/blog/court-strikes-down-open-internet-rules-what-now/> ("The decision is a real loss for U.S. Internet users; the rules offered an important safeguard for keeping the Internet the remarkable engine for free expression, creativity, and innovation that it is").

No action by the FCC is immune from litigation. Nor will this proposed legislation inoculate the Commission from the threat. At the outset, this draft directs the FCC to “adopt formal complaint procedures to address alleged violations” – a process that could be contentious as it will largely determine the process by which complaints are filed and the burden that they will impose on defendant ISPs. Beyond that, the draft requires the FCC to interpret its provisions and apply its definitions through case-by-case adjudication. The interpretation and application of this draft to ISPs’ practices could surely lead to significant litigation due to the multitude of fact-specific determinations the Commission will be required to make in any adjudication such as: whether network management is reasonable; whether a device is harmful; whether a practice constitutes throttling; whether packets are prioritized or compensation is received; whether disclosure is required; whether a specialized service is designed to circumvent any prohibitions; whether a specialized service threatens the meaningful availability of BIAS; and, perhaps in the future as an echo of our current question of whether BIAS is a telecommunications service, whether a service is BIAS at all. Even more damaging, without rulemaking authority, the Commission will be unable to clarify any of these questions or countless others in advance, creating an environment of significant uncertainty and litigation risk.

CONCLUSION

The ideal course of action is for the FCC to classify BIAS as a Title II telecommunications service and promulgate bright line, common carrier rules that would prevent ISPs from blocking lawful content, applications, services, or devices or unreasonably discriminating in transmission of lawful network traffic. It would proactively ban practices such as throttling and paid prioritization as *per se* unreasonable. The FCC would also maintain and enhance existing transparency requirements. The Commission would keep a number of key Title

II provisions while forbearing from many others. The FCC would reserve its authority to bring important Title II goals into the broadband age, such as universal service, consumer privacy, accessibility for persons with disabilities, and interconnection, among others. It would apply all authority and rules equally to both fixed and mobile connections. Further, it would create a complaint process that is easily navigable by non-experts and allow the FCC to investigate possible violations and initiate enforcement actions on its own motion.

This is the path favored by hundreds of organizations, including more than one hundred civil rights and racial justice groups, a multitude of startups, established Internet companies, investors, dozens of members of Congress, and a wide majority of the seven million people who have contacted the FCC. It is favored by countless entrepreneurs, small businesses, independent content producers, educators and, in principle, is overwhelmingly supported by liberals and conservatives across the country.⁴⁶

While congressional action could also meet all of these requirements and may, ultimately, be desirable, we need not delay the FCC's process as it nears completion to attempt to imbue it with authority that it already holds. The discussion draft currently under consideration fails to meet these requirements and strips the FCC of statutory authority that is absolutely essential to protecting consumers and the Internet, and achieving a number of other important policy goals.

Therefore, I must respectfully oppose the further development of this draft and I urge the

⁴⁶ Internet Freedom Business Alliance poll conducted by Vox Populi Polling (Nov. 10, 2014) *available at* <http://www.netfreedom.us/wp-content/uploads/2014/11/IFBA-Poll-Memo.pdf> (poll found "support for net neutrality is broad and consistent across demographics"); Haley Sweetland Edwards, "Conservatives Overwhelmingly Back Net Neutrality, Poll Finds," *Time* (Nov. 11, 2014) *available at* <http://time.com/3578255/conservatives-net-neutrality-poll/> ("Some 83% of voters who self-identified as 'very conservative' were concerned about the possibility of ISPs having the power to 'influence content' online"); Amy Kroin, "Most Conservative Voters Heart Net Neutrality," *Free Press* (Nov. 12, 2014) *available at* <http://www.freepress.net/blog/2014/11/12/most-conservative-voters-heart-net-neutrality>.

esteemed members of this subcommittee to support the FCC in swiftly concluding its process of reinstating the rules that were vacated by the *Verizon* court. Thank you Chairman Walden, Ranking Member Eshoo, and members of the subcommittee for your time and attention. I look forward to your questions.