



Testimony of Gene Kimmelman
President
Public Knowledge

Before the
U.S. House of Representatives
Energy and Commerce Committee
Subcommittee on Communications and Technology

Hearing On:
The Uncertain Future of the Internet

Washington, DC
February 25, 2015

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Public Knowledge¹, along with millions of consumers, civil and media rights groups², small businesses, and innovative start-up companies, believes that application of Title II authority under the Communications Act is critical to preserve and promote an open Internet that is affordable to all and fully supportive of freedom of expression³. We therefore support the Federal Communication Commission's (FCC) current efforts to adopt Title II rules in response to the most recent DC Circuit court ruling. The importance of maintaining an open Internet has long been a bipartisan consensus that has over the years led to the need for establishing high level, light-touch rules of the road for Internet access service providers. Public Knowledge also believes it is entirely appropriate for Congress to consider updating the Act to address inadequacies in law and to guide the FCC's understanding of Congressional intent.

Public Knowledge cares about keeping the Internet open because the Internet has become – as Congress has repeatedly recognized in past legislation⁴ – the essential communications service of the 21st Century. As communication, commerce, and civic engagement increasingly depend on broadband Internet access, it becomes even more critical to ensure that the Internet remains open for all Americans to participate online to the best of their abilities. Fortunately, in Title II, Congress has already given the FCC the flexibility to do just that.

¹ I would like to thank Harold Feld, Kate Forsey, Jodie Griffin, Chris Lewis, and Michael Weinberg for their substantial contributions to this testimony.

² See Open Letter to Latino Community Urging Support for Real Network Neutrality, signed by the National Hispanic Media Coalition, Center for Media Justice and other groups (July 14, 2014). Available at <http://centerformediajustice.org/2014/07/open-letter-to-latino-community-urging-support-for-real-network-neutrality/>

³ See Letter from Voices for Internet Freedom to Tom Wheeler, Chairman, FCC, GN Docket No. 14-28 (Nov. 3, 2014), <http://apps.fcc.gov/ecfs/document/view?id=60000978248>; Letter from Comptel, Engine, the Computer & Communications Industry Ass'n, and Internet Freedom Business Alliance to Tom Wheeler, Chairman, FCC, GN Docket No. 14-28 (Dec. 30, 2104), <http://apps.fcc.gov/ecfs/document/view?id=60001011438>; Jonathan Weisman, *Shifting Politics of Net Neutrality Debate Ahead of FCC Vote*, N.Y. Times (Jan. 19, 2015) ("The F.C.C. has received four million comments on net neutrality — overwhelmingly in favor — ahead of its Feb. 26 decision day.").

⁴ Broadband Data Improvement Act, Pub. L. No. 110-385, § 102 (2008).

The Success of the Internet is Based on Open Internet Principles

From the early stages of the Internet the concept of an open Internet allowed online innovation and investment in new technology to flourish. The principles of no blocking of content or devices, no harmful discrimination, and transparency were understood and protected by law, regulation, and precedent on the telephone network.

As the Internet was built on top of the phone network, it continued to assume these principles. Early dial-up Internet users were only allowed to attach modems to the network due to Title II protections of the *Carterfone* decision, which ensured users' right to connect any legal device to the network. Nondiscrimination principles allowed competition to flourish in the early 1990s as competitive Internet Service Providers (ISPs) and other services were guaranteed access to phone lines to provide their services. The early pioneers of the commercial web interface also credit their ability to innovate to the permission-less nature of the network.⁵ These pioneers confirm that the Internet would never have developed as rapidly into broad commercial use if online services and content creators were required to ask telecom or cable network providers permission to develop new interfaces, services, and products online. Even in 2005 as the FCC chose to reclassify all forms of broadband as Title I services, the Commission maintained the commitment to open Internet principles. In a bipartisan, unanimous vote, the FCC *Internet Policy Statement* made clear that open Internet principles were a core expectation for ISP practices.

The DC Circuit Court⁶ and the FCC have both recognized the importance of financial investment in all layers of the Internet in its rapid development and success. This concept of the virtuous cycle of investment posits that broadband networks enable the development of online services and that innovative and compelling online services drive demand for faster networks and greater bandwidth. This demand drives investment in more powerful networks and enables even greater innovation and creativity in online services. Indeed, as several companies have openly acknowledged, applying Title II to Internet access service will not impede carriers' network investment.⁷ Tech investors and venture capitalists have been some of the most strident supporters of open Internet rules⁸ due to the importance of the virtuous cycle and the need to provide investors with confidence that the online services and edge providers they support will be free to compete and innovate with incumbent services without permission or payment to play.

⁵ <http://www.biztechmagazine.com/article/2014/03/sir-tim-berners-lee-calls-net-neutrality-25th-anniversary-web>

⁶ *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

⁷ See "Letter from Sprint to Chairman Wheeler" Stephen Bye, Sprint CTO, GN Docket 12-48 (Jan 15 2015); "Verizon Admits Utility Rules Won't Harm FiOS and Wireless Investment," *Ars Technica* (Dec. 10, 2014) Available at <http://arstechnica.com/business/2014/12/verizon-admits-utility-rules-wont-harm-fios-and-wireless-investments/>; "Google: 'Strong net neutrality rules won't hurt rollout of Google Fiber,'" *Washington Post* (Jan. 27, 2015) Available at <http://www.washingtonpost.com/blogs/the-switch/wp/2015/01/27/google-strong-net-neutrality-rules-wont-hurt-the-future-rollout-of-google-fiber/>; "Comcast, Charter, and Time Warner Cable All Say Obama's net neutrality plan wouldn't hurt investors," *Washington Post* (Dec. 6, 2014) <http://www.washingtonpost.com/blogs/the-switch/wp/2014/12/16/comcast-charter-and-time-warner-cable-all-tell-investors-strict-net-neutrality-wouldnt-change-much/>

⁸ See "Open Internet Investors Letter to Chairman Wheeler" (May 8, 2014). Available at https://docs.google.com/document/d/1v34_bFesbfyF_MbQgtZtUQNfSByAgUKTICEB9pjH3jk/pub; see also Nick Grossman, "Defending the Open Internet," *The Slow Hunch* (May 8, 2014). Available at <http://www.nickgrossman.is/2014/05/08/defending-the-open-internet/>.

The Certainty Provided By Title II Based Open Internet Rules

For the last decade the FCC has worked to solidify open Internet rules in a way that maintains the virtuous cycle of investment and protects consumers. There is plenty of evidence that the threat to the open Internet is real. The difficulty that an average customer has in detecting forms of discrimination or throttling makes the need for bright line rules even greater. The first publicly reported complaint of blocking was the 2005 *Madison River Case* and it would not have been detected but for the technical expertise of the consumer involved. Major ISPs have admitted on the record⁹ what the Department of Justice¹⁰ and the courts have confirmed: that there is business advantage in blocking some online traffic or even degrading the quality of specific online services that compete with ISPs' offerings. Fortunately the Communications Act provides the FCC with several tools to address these business practices and preserve the open Internet.

There seems to be much agreement that the FCC is empowered to act to create basic open Internet rules given the widespread support for the rules created in 2010. Many major ISPs supported the *2010 Open Internet Order* and although Public Knowledge raised several concerns about the legal strength of the Order, we and other public interest groups worked to live under them, including using those rules to raise concerns about specific ISP practices.¹¹ The D.C. Circuit's *Verizon* decision confirmed our worries about the 2010 rules when the court vacated the rules and remanded them back to the FCC for action. Moreover, the D.C. Circuit Court decision in *Verizon* pointed to reclassification as the only option under the FCC's current authority which the FCC might use to institute true non-blocking and non-discrimination rules.

Title II based open Internet rules need not be burdensome to ISPs. The ability of the FCC to forbear from regulations and sections of Title II is well established and has been used in the past for mobile voice services that fall under both Title II and Title III authority. Chairman Wheeler should be commended for the proposal he publicly outlined earlier this month as he circulated his detailed proposal with his FCC colleagues. His public outline used a scalpel instead of a cleaver to carefully forbear broadband access services from provisions that did not apply to them, respecting the need to protect investment in the network side of the virtuous cycle. Chairman Wheeler explicitly ruled out subjecting ISPs to rate regulation, and addressed concerns about the potential for immediate new fees resulting from the expansion of Universal Service contributions to broadband. Chairman Wheeler's proposal provides certainty for consumers, ISPs, edge providers, and investors. It respects the balance of the virtuous cycle of investment, gives the market clear light-touch rules of the road, and gives everyone a place to bring complaints and examine network practices.

Open Internet principles are not the only values that are important for serving the public interest when it comes to broadband networks. In a unanimous 5-0 vote of the FCC in January 2014, the Commission affirmed that the Communications Act had always embodied broader, fundamental values of service to all Americans, competition, consumer protection, and public

⁹ See Michael Weinberg, "But For These Rules...." *Public Knowledge Blog* (Sept. 10, 2013). Available at <https://www.publicknowledge.org/news-blog/blogs/these-rules>.

¹⁰ Competitive Impact Statement of United States, *et al.*, *United States v. Comcast Corp.*, (D.C. Cir. 2011) at 11.

¹¹ <https://www.publicknowledge.org/news-blog/blogs/holding-att-to-account-for-blocking-facetime-on-iphones-and-ipads>

safety.¹² Referred to as the Network Compact by Chairman Wheeler, these values are the bedrock of the Americans' expectations of their phone network, and increasingly, communications networks generally. Diverse stakeholders¹³ agree that as voice, data, and other services converge onto all Internet Protocol (IP) communications networks, the Network Compact values must continue to be protected in order live up to the charge of the Communications Act and the expectations of consumers.

When the D.C. Circuit made it clear in the *Comcast* case that it intended to dramatically scale back the applicability of ancillary jurisdiction, Public Knowledge was the first organization to urge the FCC to reclassify broadband as a Title II service because only Title II could provide adequate authority to protect an open Internet and preserve other basic values of the Communications Act.¹⁴ To his credit, Chairman Wheeler's open Internet proposal also allows the FCC to preserve the Network Compact principles by not forbearing from sections of Title II that empower the FCC to further investigate how to maintain the Network Compact values for broadband. The FCC has an ongoing proceeding on the topic of the tech transitions and Public Knowledge supports further inquiry into these protections in that docket.¹⁵

Open Internet Rules Set An Example For Global Internet Freedom

Far from encouraging censorship, open Internet rules embody a commitment to neutral networks, where content is free from interference by private or governmental parties. Some critics of open Internet rules have raised concerns that the Wheeler open Internet proposal will send the wrong message to countries and world leaders who wish to censor Internet content and prohibit free speech online. On the contrary, open Internet rules provide a great example for the world and demonstrate the United States' commitment to opposing gatekeepers online, whether they are from industry or government. Concerns to the contrary have no basis in fact and are simply a scare tactic to divide the long bipartisan consensus around Internet governance on the world stage demonstrated by unanimous Congressional resolutions on the International Telecommunications Union (ITU) meetings in the last two Congresses.¹⁶

¹² Technology Transitions (GN Docket No. 13-5); AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition (GN Docket No. 12-353); Connect America Fund (WC Docket No. 10-90); Structure and Practices of the Video Relay Service Program (CG Docket No. 10-51); Telecommunications Relay Services And Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities (CG Docket No. 03-123); Numbering Policies for Modern Communications (WC Docket No. 13-97) (adopted Jan. 30, 2014); *see also* Statement of Chairman Tom Wheeler, "Adapting Regulatory Principles to 21st Centuries and Markets," (Jan. 9 2014). Available at <http://www.fcc.gov/blog/adapting-regulatory-frameworks-21st-century-networks-and-markets>.

¹³ *See* Testimony of Jodie Griffin, Senior Staff Attorney, Public Knowledge, before Committee on Commerce, Science, and Transportation, "Hearing on Preserving Public Safety and Network Reliability in the IP Transition," (Jun 5, 2014); *see also* "COMPTTEL Proposes Managerial Framework to Successfully Guide the Technology Transitions," *Comptel Press Release*, (April 2, 2014). Available at http://www.comptel.org/Files/filings/2014/04-02-14_Framework_release.pdf; *see Comments of AT&T on Proposal of Iowa Network Services, Inc. for Service-Based Technology Transitions Experiment*, GN Docket 12-353 (filed Mar. 21, 2014), at p. 2 ("...the enduring social values - ensuring universal connectivity, consumer protection, public safety, reliability and competition - that much continue to provide the foundation for communications policies in the 21st Century").

¹⁴ *Ex parte* Submission of Public Knowledge, GN Docket 09-191 (filed Jan. 28, 2010).

¹⁵ https://www.publicknowledge.org/assets/uploads/blog/15.02.05_Tech_Transitions_Comments.pdf

¹⁶ H.Con.Res. 127, passed 08/02/2012.

The United States will not be the first major western nation to create strong open Internet rules under an authority like Title II, and yet European and Canadian open Internet rules have never generated concerns about the reactions of restrictive countries. These same concerns were raised in 2012 in the lead up to the ITU's World Conference on International Telecommunications (WCIT) which we attended. At that time, the 2010 rules were still in effect, but FCC Chairman Genachowski had not closed a still open docket on the topic of Title II reclassification. Many commented that sending a delegation to the WCIT while the Title II docket remained open at the FCC would give aid and comfort to nations like China and Russia. Yet at the WCIT there was no public mention of the FCC's open docket and the United States and other delegations stood firm on their platform of Internet freedom.

This unvalidated concern ignores the fact that the ITU has already labeled broadband as a "telecommunications" service, just like Title II. It ignores that the United States and supporting countries successfully defeated efforts to give the United Nations control of the Internet in the past, while DSL Internet access was classified as a Title II service. Light touch Title II open Internet rules remain consistent with the bipartisan positions of the United States on Internet freedom and governance and can serve as an example of how Americans protect their citizens access to every corner of the web.

Most importantly, the United States should not allow nations such as China and Russia dictate our telecommunications policy through fear of the ITU. We must make our own choice as to what policies best serve the people of the United States, and how best to protect and preserve the fundamental values that are the bedrock of communications policy. It would be an act of fundamental cowardice to refuse to classify broadband as Title II for fear of provoking some unfavorable reaction from foreign dictators already seeking to leverage the ITU processes to their advantage.

Congress Must Preserve Strong Open Internet Rules and Consumer Protections

While Public Knowledge expects that the Wheeler open Internet proposal due to be voted on tomorrow is carefully crafted and will provide the certainty and protections consumers demand, we also recognize that Congress is considering various avenues of legislation that may impact these rules from narrowly focused open Internet bills to whole updates of the Communications Act. We continue to offer our organization as a resource to Congress as it considers these proposals, including our ongoing participation in Chairman Upton and Walden's ongoing Communications Act Update white paper process. The jurisdiction and authority of the FCC in the Communications Act is a careful balance of priorities, that must allow for a flexible agency that can keep up with the rapid pace of change in the information and communications technology sector.

When Congress has legislated to exercise appropriate oversight, it has generally recognized the need to preserve regulatory flexibility by enhancing rulemaking authority. Congress' actions in 1993,¹⁷ which lay the foundation for the modern wireless industry, illustrate how Congress has exercised its responsibility for oversight and used its legislative authority to direct the

¹⁷ Omnibus Reconciliation Act of 1993, Pub. L. No. 103-66, enacted August 10, 1993.

Commission. For more than a decade, the FCC struggled to find the appropriate regulatory framework for mobile wireless voice services. The Commission relied on case-by-case adjudication to determine which services were subject to Title II and thus eligible for interconnection rights and access to phone numbers, and which services were not. (It is important to stress that the nascent wireless industry *wanted* to be classified as a Title II service to gain the pro-competitive benefits of Title II classification.)

The 1993 Act included numerous innovations.¹⁸ Most importantly, Congress replaced the FCC's case-by-case adjudication with a regulatory classification for "commercial mobile radio service" (CMRS). While specifying the general principle for common definition, it explicitly required the FCC to define the statutory terms via regulation. Congress also explicitly classified CMRS as Title II, but gave the FCC the flexibility to forgo any provisions that it found unnecessary.

As this example shows, and as Congress has repeatedly recognized in its periodic updates of the Communications Act, rulemaking authority provides critical flexibility for the Commission to adapt existing rules to rapidly evolving technology and the ever-shifting marketplace. A statute captures a single moment in time. It works best, therefore, when focused on broad and timeless principles -- fundamental values such as the bipartisan Network Compact -- rather than trying to account for every single detail.

The one exception to this pattern was when Congress passed the Cable Act of 1984. In an effort to provide "certainty" and "clarity," Congress stripped both the FCC and local franchising authorities of the bulk of their consumer protection authority. Congress instead included specific provisions to address the handful of specific issues that had emerged in the 15 years the FCC had regulated cable pursuant to its ancillary authority. Congress assumed that by legislating in detail, and addressing the problems immediately before it, the 1984 Cable Act would promote both competition and innovation to the benefit of consumers.

Instead of promoting competition and innovation to the benefit of consumers, the 1984 Cable Act created a concentrated industry marked by escalating prices and poor customer service. Cable operators, free from regulatory oversight, worked quickly to crush incipient competition and leverage their control over programmers. The situation deteriorated so rapidly and thoroughly that, after only eight years, Congress enacted an almost complete and sweeping reversal of its 1984 legislation. The Cable Consumer Protection and Competition Act of 1992, unlike its 1984 predecessor, empowered the FCC to address anticompetitive practices and promote competition in broad terms.

The FCC needs rulemaking flexibility. Without rulemaking authority, the FCC cannot address new circumstances that have *already* become part of the public debate. Nor can it address pressing consumer protection issues, as envisioned when the FCC initially classified broadband as an information service.

The lack of strong rulemaking authority of the Federal Trade Commission is frequently cited as one of the weaknesses of the agency, and specifically one of the reasons why it cannot

¹⁸ For example, the 1993 Act gave the FCC the authority to conduct spectrum auctions, which it left to the FCC to define by rule subject to guidance from Congress on general principles. *See Id.* at § 309(j).

adequately address concerns about network neutrality. While adjudication is a useful tool in specific circumstances, it does not replace the ability of rulemaking to respond to changes in a dynamic marketplace.¹⁹ The process of rulemaking allows all stakeholders to come together in a well-defined and deliberative process subject to judicial review. It allows the FCC to keep itself informed of technological and marketplace developments, and to make necessary adjustments or correct mistakes.

Rulemaking also provides certainty. It ensures consumers can expect the same level of protection for a service regardless of the specific provider or the specific facts of any given case. It simplifies the process of consumer protection for both consumers and the agency. Development of a body of case law takes time, and litigating the first cases can create enormous expense. Congress should avoid legislation with rigid rules and no FCC flexibility for future rulemakings. Such a bill could open the door to endless litigation as the only means to clarify the statutory language. Rather than permitting consumer protections to evolve in concert with the changing broadband marketplace and adjust to changes in technology, the shift to adjudication will create ossification and leave consumers dangerously exposed as a body of relevant case law slowly develops.

Even while the FCC spent the last decade considering other sources of rulemaking authority, the FCC explicitly left Title II as an option should it ever become necessary. If Congress intends to remove this option, it needs to provide the FCC with an equally flexible tool to replace Title II and preserve open Internet and basic Network Compact protections. In our testimony before the Senate Commerce Committee on January 21, 2015²⁰ we detailed the specific weaknesses of the Thune/Upton draft bill including its removal of FCC rulemaking authority over broadband.

Those seeking to limit FCC authority like to recite the mantra “first do no harm.” While we appreciate Congress’s role in updating the Communications Act periodically, we remain concerned that current legislative proposals are likely to cause more harm than benefit. We urge the FCC to move forward on Title II rules and urge Congress to evaluate those in light of broader policy goals.

The history of the development of our modern communications landscape demonstrates that Title II preserves critical values, promotes competition and investment, and is flexible enough to accommodate changes in technology and the marketplace. The concerns that Title II is insufficiently flexible for broadband can – and should – be thoroughly examined in this fuller context. In doing so, Congress can continue to protect the fundamental values of our communications system.

¹⁹ <http://www.law360.com/articles/594183/brill-sees-ftc-role-in-net-neutrality-but-no-solo-spotlight>

²⁰ https://www.publicknowledge.org/assets/uploads/blog/Kimmelman_Testimony.pdf