

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Restoring Internet Freedom) WC Docket No. 17-108
)

COMMENTS

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EXECUTIVE SUMMARY

We, as members of Congress who also sit on the House Energy and Commerce Committee, submit these comments out of deep concern that the FCC's proposal to undo its net neutrality rules fundamentally and profoundly runs counter to the law. As participants either in the passage of the Telecommunications Act of 1996 or in decisions on whether to update the Act, we write to provide our unique insight into the meaning and intent of the law.

Most importantly, the FCC's proposal impermissibly ignores the Commission's core mandate to fully consider the public interest before taking action. When adopting a broad public interest standard for the Commission, we gave the FCC a serious responsibility to consider the effects of its policies on the entire public, not just a favored few. On this score, the FCC's proposal falls flat. The proposal simply ignores the most critical issues affecting our country today—priorities such as free speech and democracy, small businesses, jobs and economic development, and privacy. Instead, the Commission narrowly focused on a single ill-conceived measure of broadband investment to the exclusion of all others.

The proposal fails to recognize that the internet has become one of the most powerful communications tools in modern society and is home to some of the most important conversations taking place today. The internet has been used by groups to organize social movements from all political stripes. These benefits are particularly powerful in minority communities, which are too often underrepresented in traditional media. However this dialogue can only take place because citizens understand that no one—not their government and not their broadband companies—can limit what they say.

Repealing net neutrality would undermine Americans' ability to engage in these conversations. Without the protections afforded by the 2015 net neutrality rules, internet service providers (ISPs) will be subject to economic and political pressures to choke off unpopular conversations or speed up viewpoints supported by the politically dominant.

This threat is real. In just the past year we have seen efforts by those in charge in Washington to turn off video cameras on the House floor and even to block content from websites. The FCC's net neutrality protections may be the last guard at the gate to free expression on our communications networks. But the Commission's proposal inexplicably fails to even mention the potential effects on free speech or how it could undermine our democracy.

The FCC's proposal also overlooks the dramatic and detrimental effect it could have on small businesses and jobs across the country. Small businesses are the engines that drive the economy and the open internet is the fuel that powers them. From bakers to bike shops, from retail to real estate, from cooking to construction—nearly all businesses today need to be online.

After mentioning the effects of its actions on small ISPs, the proposal's discussion of small business comes to a screeching stop. The Commission's proposal makes no effort to recognize how its actions could devastate other small businesses across the country. And with so many of these businesses owned by minorities and women, any action the Commission takes that harms small businesses could have a disproportionate effect on these entrepreneurs.

The proposal also disregards the impact the Commission could have on jobs. Small businesses create more than half of the jobs in the country. Moreover, in this time of technological transition, Americans are increasingly using the internet to take classes, train for new opportunities, and apply for jobs. Without net neutrality, many of the resources people use today could slow down or even stop. In today's uncertain economic environment, overlooking how this administration's policies could halt job creation and job training is simply unacceptable.

The Commission also overlooks the affect that its proposal would have on Americans' privacy protections. Americans overwhelming support stronger and clearer privacy rules. Yet the Commission—without comment—proposes to eliminate before-the-fact protections at the FCC in favor of an enforcement-only approach. The FCC should not degrade people's privacy rights without thorough consideration.

Instead of considering these critical national priorities, the proposal single-mindedly concentrates on one issue to the exclusion of all others: the raw dollars spent on network deployment. This narrow focus is clearly contrary to the public interest—if we had intended network investment to be the sole measure by which the FCC determines policy, we would have specifically written that into the law.

But even so, the proposal relies on scant evidence and questionable assumptions to support its conclusions. In fact, there is bipartisan consensus that the FCC's broadband deployment data is flawed. Even the privately-funded studies the proposal relies upon ignore that most experts understand that computing power will increase and relative price will decrease over time. The FCC's proposal does not recognize these basic facts. Nonetheless, we agree that the FCC does have a duty to consider the levels of broadband deployment, but it should use better measures such as how many people the networks reach and the quality of the connections.

Aside from misunderstanding the public interest standard, the FCC's proposal also misstates the distinction we made in the Communications Act between telecommunications services and information services. We directed the Commission to consider network infrastructure differently than the content that runs over it. The FCC's proposal impermissibly reads this distinction out of the law. While we understand that some may disagree with the law, Congress must make that decision—not the Commission.

Finally, we are concerned that the FCC has jeopardized its independence by taking its instruction directly from the White House. Chairman Pai has refused to say whether he was given direction from the President when they met in the Oval Office earlier this year. But the President's spokesman suggested publicly that the President may have asked the FCC to undo the legal underpinnings of net neutrality. A few weeks after this White House announcement, the FCC complied. If the President did instruct this action, the proceeding may be fatally flawed.

I. Introduction

The undersigned members of Congress submit these comments in response to the Federal Communications Commission’s (“Commission” or “FCC”) Notice of Proposed Rulemaking WC Docket No. 17-108 (the “Proposal”), which proposes to undo the legal underpinning of net neutrality protections.¹ We have either worked on the Telecommunications Act of 1996 or have worked on telecommunications issues since the passage of the Act. We have the unique ability to provide insight on the actual meaning and intent of the Act.

We write out of a deep concern that the FCC’s proposal fundamentally and profoundly misstates the law. In particular, the proposal takes an impermissibly narrow view of the public interest and therefore overlooks important national priorities such as the harm the proposal could have on free speech and democracy, small businesses, jobs and economic development, and privacy. The proposal also impermissibly reads out of the law the distinction between information services and telecommunications services. Finally, the process through which the proposal originated may be defective as it may be based on inappropriate influence by the President. As such, any action the FCC takes based on the analysis contained in the proposal will be legally flawed and contrary to the law.

II. In adopting the public interest standard, we required the Commission to balance national priorities—not concentrate on one to the exclusion of all others.

The public interest standard has served as the bedrock for communications policy since the founding of the Federal Radio Commission 90 years ago.² When we passed the Communications Act into law, we specifically continued our direction that the FCC adopt policies in the “public interest, convenience, and necessity.”³ We included the direction to act in the public interest over 100 times in the Communications Act to stress that it forms the core of the law, and it should form the heart of every decision the FCC makes.

Throughout its near-century of existence, both Congress and the courts have repeatedly reaffirmed the sanctity of this standard. We intend this direction to give the FCC a broad mandate to weigh all relevant factors before making a decision. This extensive review is not an option that the FCC can exercise at its discretion—it is an obligation that the FCC must satisfy as part of every policy decision it makes on behalf of the American people.

Some have incorrectly stated that we used this broad standard to give the Commission wide discretion on how it chooses to act. To the contrary, we intended its breadth to instill an obligation and a responsibility on the FCC. We did not want the FCC to pick favorite companies

¹ Federal Communications Commission, *Restoring Internet Freedom*, Notice of Proposed Rulemaking, WC Docket No. 17-108, FCC 17-60 (rel. May 23, 2017). [Hereinafter Internet Freedom NPRM].

² Radio Act of 1927, Pub. L. No. 69-632.

³ Communications Act of 1934, Pub. L. No. 73-416, *inter alia*.

or preferred industries. We did not intend the agency to cherry pick data points to support predetermined conclusions.

The direction is simple, even if its execution can be hard. The FCC must take into account the interest of the entire public.⁴ This standard was not meant to be met with a quick calculus such as: regulation is equivalent to reduced investment in fiber which is equivalent to the rule is not in the public interest. The agency's responsibility is to the entire public and it is required to balance multiple important considerations. This responsibility is not meant to be taken lightly.

The FCC's current proposal does not satisfy the Commission's legal obligation to consider the breadth of important national priorities. Instead, it narrowly focuses on a single ill-conceived measure of the public interest to the exclusion of all other priorities. Worse, testimony given by two Commissioners demonstrates a fundamental misunderstanding of the standard we require of them and twists the public interest standard into an impossible burden on the public.

The Chairman seems to believe that his primary—and possibly only—consideration in this proceeding is whether the tens of billions of dollars that ISPs have invested in their network infrastructure is “substantially greater” than a hypothetical amount the companies would have spent without the 2015 Order. Specifically, Chairman Pai stated that to change his mind about undoing net neutrality, he would need to see in the record “an economic analysis that shows credibly that infrastructure investment is increased dramatically.”⁵ Commissioner O’Reilly agreed and went on to state that many of the millions of “comments are empty and devoid of any value, in my opinion.”⁶ This testimony indicates that the Commissioners may be ignoring

⁴ In fact, even the administration agrees with this assessment. When instructing executive branch agencies on how to perform proper benefit-cost analyses, OMB Circular 94 states that “Analyses should include comprehensive estimates of the expected benefits and costs to society based on established definitions and practices for program and policy evaluation.” Circular No. A-94 Revised at #6 (www.whitehouse.gov/omb/circulars_a094). The Circular goes on to note that: “Both intangible and tangible benefits and costs should be recognized. The relevant cost concept is broader than private-sector production and compliance costs or government cash expenditures.” *Id.* at No. 6(a).

⁵ House Committee on Energy and Commerce, Testimony of FCC Chairman Ajit Pai, *Hearing on Oversight and Reauthorization of the Federal Communications Commission*, 115th Cong. (Jul. 25, 2017).

⁶ House Committee on Energy and Commerce, Testimony of FCC Commissioner Michael O’Rielly, *Hearing on Oversight and Reauthorization of the Federal Communications Commission*, 115th Cong. (Jul. 25, 2017).

relevant points raised by the public⁷ and may have impermissibly prejudged the issue without fully considering the input from the public.⁸

We put the obligation on the Commission to determine whether a new policy is in the public interest, but the Chairman's comments make it appear that he is flipping the burden to the public to stop an unwanted Commission action. Requiring that the public demonstrate a dramatic increase in spending over a hypothetical baseline is wholly arbitrary and would almost certainly lead to a capricious result for most of the country.⁹ Rather than imposing new burdens on the public, before moving forward the Commission must instead consider the impact its actions could have on free speech, small businesses, jobs and economic opportunity, and privacy.

a. Before acting, the FCC must first ask for public comment on whether its actions will harm free speech and our democracy.

Net neutrality is crucial to protecting free speech. Without net neutrality protections, ISPs could succumb to market forces to discriminate against competing content or could be compelled by political forces into restricting unpopular content. The FCC must therefore weigh the impact its actions would have on free speech before it takes steps that could undermine the existing net neutrality rules.

The internet has become one of the most powerful communications tools in modern society and is home to some of the most important conversations taking place today. The internet has been used by social groups to organize social movements from all political stripes. This online dialogue is now a critical component of our democracy.

For instance, the organizing behind the Women's March and healthcare protests could not have happened at the same scale if not for tools provided by social media.¹⁰ But this kind of activism is just as important on the political right. Even the President finds new ways to energize his followers by using online platforms.

The internet has allowed citizens to reach across geographic and social boundaries to find people with similar beliefs and those who do not. Within hours, these conversations can gain prominence and become forces of change in national politics. This dialogue can take place only because citizens understand that no one—not their government and not their broadband companies—can limit what they say.

⁷ *Safari Aviation Inc. v. Garvey*, 300 F.3d 1144, 1151 (9th Cir. 2002); *Am. Mining Congress v. EPA*, 965 F.2d 759, 771 (9th Cir. 1992).

⁸ *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970).

⁹ 5 U.S. Code §706(2)(A).

¹⁰ *How Mainstream Media Missed the March that Social Media Turned into a Phenomenon*, Washington Post (Jan. 22, 2017); see also, Nish Acharya, *The Women's March After Trump's Inauguration Is A Perfect Example Of Social Entrepreneurship*, Forbes (Jan. 19, 2017).

These benefits are particularly powerful in minority communities, which are often underrepresented in traditional media.¹¹ The internet has allowed these communities to connect in unprecedented ways. For instance, activists were able to tap the power of the open internet and use the single hashtag BlackLivesMatter to organize nationwide protests and build a conversation that continues today.¹²

But repealing net neutrality could undermine Americans' ability to engage in these types of conversations. Without the protections afforded by the 2015 net neutrality rules, ISPs can choke off unpopular conversations or speed up viewpoints supported by the powerful.

The incentives to act can be both economic and political. Economic incentives arise because the conglomerates that own network infrastructure are increasingly purchasing content like news outlets. That means that ISPs have financial incentives to give preference to the shows they own, the websites they run, and the news they report. In fact, these preferences are already taking place as ISPs increasingly exempt their own content from consumers' data caps.¹³ If the net neutrality rules are eliminated, ISPs will feel competitive pressures to expand this practice unchecked.

Independent voices—those outside the mainstream—may be most at risk simply because they don't have an affiliation with the companies that run the internet. That is especially true for minority-owned media outlets, which are more likely to be independent.¹⁴

We specifically directed the Commission to put a premium on protecting these voices. For instance, when we passed the Communications Decency Act (CDA), we wrote that the internet offers “a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”¹⁵ We adopted a policy directing the FCC to “maximize user control of what information is received by individuals, families, and schools who use the Internet.”¹⁶ We directed the Commission to “preserve the

¹¹ Rebecca Stone and Kelly M. Socia, *Boy With Toy or Black Male With Gun: An Analysis of Online News Articles Covering the Shooting of Tamir Rice*, Race and Justice (Jan. 29, 2017).

¹² Helen Margetts and Peter John, *et. al.*, *Political Turbulence: How Social Media Shape Collective Action*, at 59-60 (2016).

¹³ *FCC Asking if Data Plans Violate Internet Rules*, Los Angeles Times (Dec. 18, 2015); *see also Free Data Sounds Great, but the FCC Has Questions*, National Journal (Dec. 17, 2015); *More Telecoms let You Watch Video Without Dinging Data Caps*, Associated Press (Dec. 14, 2015); *FCC Concerned About AT&T Exempting DirecTV from Data Caps*, Associated Press (Nov. 10, 2016); *FCC: Verizon, AT&T Probably Violate Net Neutrality*, PC Mag (Jan. 12, 2017).

¹⁴ *Pillars of Black Media, Once Vibrant, Now Fighting For Survival*, New York Times (July 2, 2016).

¹⁵ 47 U.S.C. §230(a)(3).

¹⁶ 47 U.S.C. §230(b)(3).

competitive free market that currently exists on the internet” and keep that market “unfettered by federal or state regulation.”¹⁷

Our intention was clear: the FCC’s priority should be protecting independent voices by making sure that consumers are the ones who choose what content they access online—not the government and not big corporations. Confusingly, the FCC’s proposal cites these provisions of the law for the opposite contention. The proposal suggests that these sections of the law show that we intended the FCC to remove consumer protections that allow people to decide for themselves what they see online.¹⁸ That contention is simply wrong and should not be used as the basis for undoing net neutrality.

Unfortunately, ISPs have more than just financial reasons to choke off independent content—the pressure can also be political. If net neutrality protections are removed, nothing stops those in power from pushing broadband companies to censor dissenting voices or unpopular opinions. Even large companies may feel pressure to please those in power out of fear of reprisals. Indeed, in just the past year, we have seen efforts by the politically powerful to block video content from being transmitted to the American people¹⁹ and more recently, we have seen efforts to block content from websites.²⁰ The FCC’s net neutrality protections may be the last guard at the gate of free expression on our communications networks.

In the current heated political environment, the powerful have looked for ways to limit conversations they deem objectionable. Without net neutrality, the companies who control the networks would be caught in the middle. They would have to make a decision without any legal protections. But under the current net neutrality protections, ISPs are shielded from having to bow to these pressures.

We were dismayed that the FCC’s proposal does not mention the costs of its proposal to free speech or to our democracy. The proposal also fails to acknowledge the disproportionate effects its proposal could have on minority communities’ ability to connect and to organize. The Commission would not be fulfilling its legal obligation to the public interest if it attempts to move forward without balancing these important national priorities. The Commission must first ensure that it has an adequate record to address these issues.

b. Before acting, the FCC must first ask for public comment on whether its actions will harm small businesses, economic development and jobs across the country.

The FCC’s proposal is correct to consider the effects of its actions on small ISPs. But the proposal fails to acknowledge the effects that its actions could have on other small businesses

¹⁷ 47 U.S.C. §230(b)(2).

¹⁸ Internet Freedom NPRM, *supra* n. 1, at ¶ 1.

¹⁹ *House Republicans Cut C-SPAN Cameras During Gun Control Sit-In*, Time.com (June 22, 2016) (<http://time.com/4378912/congress-house-cspan-feed-cut/>).

²⁰ *Hill Republicans Warn Big Tech: Tread Carefully*, Axios, (July 12, 2017) (www.axios.com/rep-publicans-nudge-big-tech-over-net-neutrality-activism-2458262562.html).

and jobs across the country. These small businesses are the engines that drive the American economy and the open internet is the fuel that powers them. More than half of all sales in the country are through small businesses²¹ and, with eight in ten of all Americans shopping online,²² these sales are increasingly made on the internet. These small businesses can be found nationwide. . From bakers to bike shops, from retail to real estate, from cooking to construction—nearly all businesses today need to be online.

The internet is creating new opportunities not only in the big cities and suburbs, but also in rural America. By the end of President Obama’s term, almost half of new startups were sprouting in regions outside the top 35 metro areas.²³ And these businesses mean jobs. The jobs of today are either online or can be found online. The internet is essential for training and applying for new jobs. As technology shifts cause large corporations to shave off jobs, small businesses have been more than making up the difference by providing 55 percent of all jobs in the country.²⁴

But the real power of the internet is that with just an idea and a website, anyone can become an entrepreneur. With a working broadband connection, anyone can work from home, sell their own products online, and connect with companies a world away. This is especially true for minority-owned and woman-owned businesses. Over 17 percent of firms with employees are minority-owned.²⁵ And nearly 20 percent of these firms are women-owned.²⁶ Any action the Commission takes that harms small businesses could have a disproportionate effect on minority communities and women-owned businesses.²⁷

Small businesses have thrived online because the costs to launch are so much lower.²⁸ With the current protections in place, entrepreneurs pay only once to get their new businesses

²¹ U.S. Small Business Administration, *Small Business Trends* (www.sba.gov/managing-business/running-business/energy-efficiency/sustainable-business-practices/small-business-trends).

²² Pew Research Center, *Online Shopping and E-Commerce*, at 2 (Dec. 19, 2016).

²³ Michael Mandel, *How the Startup Economy is Spreading Across the Country — and How It Can Be Accelerated*, TechNet (Mar. 29, 2017).

²⁴ *Small Business Trends*, *supra* n. 21.

²⁵ U.S. Census Bureau, *Nearly 1 in 10 Businesses With Employees Are New, According to Inaugural Annual Survey of Entrepreneurs* (Sep. 1, 2016) (press release).

²⁶ *Id.*

²⁷ For instance, according to Etsy, 88 percent of their sellers are women, the majority of which are sole-proprietors with an average household income of \$44,900. Redefining Entrepreneurship: Etsy Sellers’ Economic Impact 2013 (https://extfiles.etsy.com/Press/reports/Etsy_RedefiningEntrepreneurshipReport_2013.pdf).

²⁸ See, e.g., Babson College, *The State of Small Businesses in America 2016*, at 13 (showing that cost of IT is one of the lowest barriers for small businesses).

online. But under the Commission's proposal, these businesses could need to pay over and over just to compete—once to their own ISP and then to every other ISP to get access to their subscribers at the same speeds as their competitors. That cost may simply be too much for these small businesses in today's economy, considering that the census bureau found that nearly one in ten companies with employees are new and still getting off the ground.²⁹ The situation is even starker for minority and women-owned businesses, which both tend to be newer than the national averages.³⁰

The entrepreneurs running these small businesses—real, hardworking people—used the internet to get started, to create new opportunities, and to create jobs for others. But these entrepreneurs need access to the same internet at the same speeds as large corporate interests. The Commission's proposal suggests the FCC should allow paid prioritization so that big businesses can pay for faster speeds that their smaller competitors cannot.³¹ The proposal suggests that ISPs should be allowed to charge extra for fast lanes or other advantages to access their subscribers.³²

This proposal is a dramatic change from the regime that has made the online economy so successful. The internet has been such a powerful tool precisely because small businesses can have websites as powerful as the world's largest corporations. The only limits are their imaginations—not their bank accounts. Once an entrepreneur pays to plug into the web, they are equipped to compete with anyone. That is how the internet has always kept costs for new businesses so low.

But these opportunities will dry up if the FCC follows through with its proposal. If small businesses cannot get access to the same internet at the same speeds as their larger competitors, their survival is put at risk. The FCC's proposal would put a new hurdle in front of new and aspiring entrepreneurs. For too many of them, that will be one obstacle too many.

Worse, the Commission's proposal has the potential to rip the internet in half, creating a first class section for those with deep pockets and a lower class version for small businesses. Under this regime, the innovative startups of today and tomorrow may simply disappear because they will lose access to the internet that has allowed them to compete against larger corporations. This loss could slow the entire economy, eliminate existing jobs and take away opportunities for the future.

When we included the public interest standard in the Communications Act, we required the Commission to account for these kinds of losses. Before taking actions that could harm small businesses and kill jobs, the FCC must balance the damage this policy could inflict on the public.

²⁹ U.S. Census Bureau Press Release, *supra* n. 25.

³⁰ *Id.*

³¹ Internet Freedom NPRM, *supra* n. 1, at ¶ 85-88.

³² *Id.* at ¶ 85.

c. Before acting, the FCC must first ask for public comment on whether its actions will harm people’s privacy.

When we passed the Communications Act, we specifically included provisions to account for people’s privacy when they use network infrastructure. We understood how important people’s personal information can be and how vulnerable that information is when people must send it over communications networks. We therefore laid out specific privacy rules of the road for when people use network infrastructure,³³ and those protections currently extend to broadband.³⁴

These protections are now more important than ever. Eighty-four percent of Americans say they are worried about their online privacy and security³⁵ and 91 percent of adults think they have already lost control over how companies collect and control their personal information.³⁶ Nearly three-quarters of people who use the internet say they want more control over their information.³⁷ Americans simply do not want their financial, medical, and other personal information shared without their permission.

These concerns not only have an impact on people’s well-being; they can have a detrimental effect on the economy as well. According to a study by the National Telecommunications and Information Administration, people limit their economic and civic activities online when they are concerned about their privacy.³⁸

The Commission’s current proposal would remove the statutory privacy rules that can protect broadband users before they are harmed. Instead, the Commission has proposed that the Federal Trade Commission could act on privacy violations only after the damage has been done. Nearly half of internet users surveyed say privacy regimes like this have left them confused, discouraged, and impatient.³⁹

³³ 47 U.S.C. §222.

³⁴ Federal Communications Commission, *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, GN Docket No. 14-29, FCC 15-24 at ¶461 (rel. March 12, 2015).

³⁵ National Telecommunications and Information Administration, *Lack of Trust in Internet Privacy and Security May Deter Economic and Other Online Activities* (May 13, 2016) (www.ntia.doc.gov/blog/2016/lack-trust-internet-privacy-and-security-may-deter-economic-and-other-online-activities).

³⁶ Pew Research Center, *The State of Privacy in Post-Snowden America* (Sept. 21, 2016) (www.pewresearch.org/fact-tank/2016/09/21/the-state-of-privacy-in-america/).

³⁷ *Id.*

³⁸ National Telecommunications and Information Administration, *supra* n. 35.

³⁹ Pew Research Center, *supra* n. 36.

We were disturbed that the Commission’s proposal failed to recognize the potential harm it could cause to people’s privacy. To fulfill its obligation to act in the best interest of the public, the Commission must first develop a record that allows it to balance the effects of its actions on people’s personal information.

d. The raw dollar amount spent on networks in a two-year period is not an accurate measure of the “public interest” and should not be the basis of public policy.

To support its contention that the 2015 Open Internet Order is contrary to the public interest, the current proposal relies almost exclusively on a claim that the 2015 Order has depressed investment in network infrastructure.⁴⁰ But the proposal relies on scant evidence and questionable assumptions.⁴¹ The FCC acknowledges that others have drawn opposite conclusions, but gives these contrary views short shrift.⁴² The proposal fails to recognize that the Congressional record—including hearing testimony from Republican witnesses—questions whether these analyses actually support the conclusion that investment decisions could be traced back to the FCC’s 2015 decision.⁴³

Unlike the Commission’s proposal, we understood when we voted on the Communications Act that any number of factors could affect how much specific companies spend on their network at any one time. Most experts believe that computing power will increase and relative price will decrease over time.⁴⁴ And this law has held true for network technology since the 2015 Order was passed. The cost of fiber has decreased by nearly 20 percent since 2003.⁴⁵ And the more widespread use of small cell technology has led to the cost of deploying wireless networks to go down dramatically.⁴⁶

The national priority the FCC should consider is not the amount spent on network infrastructure, but instead on how many people the networks reach and the quality of the connections. To measure this national interest, the Commission must also include factors such as

⁴⁰ Internet Freedom NPRM, *supra* n. 1, at ¶ 44-47.

⁴¹ *Id.* at ¶ 45, fn. 113-115.

⁴² *Id.* at ¶ 45, fn. 116.

⁴³ See, e.g., House Committee on Energy and Commerce, Testimony of Michael Mandel, *Hearing on Common Carrier Regulation of the Internet: Investment Impacts*, 114th Cong. (Oct. 27, 2015) (Testifying in response to questions about whether PPI’s study shows Title II impacted investment that “[w]e don’t know what is going to happen [under Title II] as things change, evolve over the next several years, because I tend to agree with the other panelists that this is not a short-term thing. These are long-term issues that evolve over time.”).

⁴⁴ Intel, *50 Years of Moore’s Law: Fueling Innovation We Love and Depend On* (accessed July 13, 2017).

⁴⁵ U.S. Bureau of Labor Statistics, *Producer Price Index by Industry: Fiber Optic Cable Manufacturing: Fiber Optic Cable*, Federal Reserve Bank of St. Louis (Jul. 13, 2017).

⁴⁶ CNET, *The Carriers’ Not-So-Secret Weapon to Improve Cell Service* (Jun. 9, 2017).

actual deployment, relative speeds, and investment and innovation from ancillary business like websites and apps. The proposal impermissibly overlooks all of these factors.

Regardless of whether the studies cited in the recent proposal actually support the Commission's assertions, this factor alone cannot satisfy the heavy responsibility of determining whether a policy is in the interest of the public. If we had intended network investment to be the sole measure by which the FCC determines policy, we would have specifically written that into the law. We did not.

In fact, the FCC would violate its mandate if it bases its final order on only one narrow data point, rather than taking a wider scope including actual deployment, relative speeds, investment and innovation from ancillary business like websites and apps. And as discussed above, the Commission is prohibited from ignoring the effects of its actions on important national priorities such as free speech, democracy, small businesses, economic opportunity, jobs, and privacy.

Unfortunately, the Commission's proposal fails on this basic test. If the FCC determines that its proposal does not give sufficient notice or that the record does not allow the Commission to weigh all of the relevant priorities, the law requires the Commission to issue a further notice before repealing or weakening the existing protections.

e. The FCC must improve the accuracy of its broadband deployment data before it can make decisions that are based on the level of broadband deployment.

The Commission's sole rationale for its proposal is that the FCC's 2015 Order is harming broadband competition and deployment.⁴⁷ However, in the Administrative Procedures Act, we required that the Commission base its policy decisions on reliable and accurate data.⁴⁸ Unfortunately, the FCC's broadband deployment data is widely known to be faulty and that it systematically overstates broadband coverage. Since the FCC cannot base its decision on data that it knows to be incorrect, it must update its data before moving forward.⁴⁹

The Congressional record is replete with concerns about the FCC's current broadband deployment data.⁵⁰ Members of Congress—both bipartisan and bicameral—have consistently rejected its reliability.⁵¹ We know our districts well and we know which of our constituents have

⁴⁷ See generally, Internet Freedom NPRM, *supra* n. 1, at ¶ 2.

⁴⁸ 5 U.S.C. §706(2)(a).

⁴⁹ *Id.*

⁵⁰ House Committee on Energy and Commerce, *Hearing on Broadband: Deploying America's 21st Century Infrastructure*, 115th Cong. (Mar. 21, 2017); see also House Committee on Energy and Commerce, *Hearing on Defining and Mapping Broadband Coverage in America*, 115th Cong. (June 21, 2017).

⁵¹ House Committee on Energy and Commerce, *Hearing on Broadband: Deploying America's 21st Century Infrastructure*, 115th Cong. (Mar. 21, 2017); see also House Committee

coverage. We recognize that the FCC's maps overstate coverage. However, it is not just us; both Republican and Democratic witnesses have testified about the many flaws with the FCC's data and how the FCC cannot base decisions on its faulty information.⁵² These problems have prompted both Republicans and Democrats to pursue legislation to spur the FCC to fix its faulty data.⁵³

According to witness testimony, the FCC's reporting presumptions make the data ill-suited for making policy decisions.⁵⁴ Experts widely agree that these presumptions lead to FCC data that shows more competition than what actually exists. This overstatement distorts the Commission's view of broadband deployment and undermines its decision making.

The FCC has recognized the shortcomings in its data and has begun considering a process to improve it.⁵⁵ However, we directed the Commission to base its decisions on reliable deployment data. In Section 706 of the Telecommunications Act of 1996 we required the FCC to perform an annual inquiry "concerning the availability of advanced telecommunications

on Energy and Commerce, *Hearing on Defining and Mapping Broadband Coverage in America*, 115th Cong. (June 21, 2017).

⁵² See House Committee on Energy and Commerce, Testimony of James Stegeman, *Hearing on Broadband: Deploying America's 21st Century Infrastructure*, 115th Cong. at 19-22 (Mar. 21, 2017); see also House Committee on Energy and Commerce, Testimony of Steven Berry, *Hearing on Broadband: Deploying America's 21st Century Infrastructure*, 115th Cong. at 13-14 (Mar. 21, 2017); see also House Committee on Energy and Commerce, Testimony of LeRoy T. Carlson, *Hearing on Broadband: Deploying America's 21st Century Infrastructure*, 115th Cong. at 9-16 (Mar. 21, 2017); see also House Committee on Energy and Commerce, Testimony of Brian Darr, *Hearing on Broadband: Deploying America's 21st Century Infrastructure*, 115th Cong. at 3-5 (Mar. 21, 2017); see also House Committee on Energy and Commerce, Testimony of Brent Legg, *Hearing on Defining and Mapping Broadband Coverage in America*, 115th Cong. at 6-7 (June 21, 2017); see also House Committee on Energy and Commerce, Testimony of Brian Darr, *Hearing on Defining and Mapping Broadband Coverage in America*, 115th Cong. at 2-3 (June 21, 2017).

⁵³ H.R. 1546; S. 1104.

⁵⁴ House Committee on Energy and Commerce, Testimony of James Stegeman, *Hearing on Broadband: Deploying America's 21st Century Infrastructure*, 115th Cong. at 19-22 (Mar. 21, 2017). For example, the data is reported based on a one-served, all-served presumption, meaning that if even one home is served by a carrier in a census block, the entire census block will be deemed served. The approach can lead to particularly skewed results because some census blocks are the size of Connecticut. House Committee on Energy and Commerce, Testimony of Brent Legg, *Hearing on Defining and Mapping Broadband Coverage in America*, 115th Cong. at 6-7 (June 21, 2017).

⁵⁵ Federal Communications Commission, *Modernizing the FCC Form 477 Data Program*, Further Notice of Proposed Rulemaking, WC Docket No. 11-10, FCC-Cir1708-03, at ¶ 6 (rel. []).

technology.”⁵⁶ And we specifically tied this inquiry directly to the Commission’s legal authority to take action. We similarly required the FCC to report on competition among mobile services.⁵⁷ We wanted the FCC to base its decisions on sound, un-biased data.⁵⁸

Before moving forward, the FCC should first correct its data, as we required. The FCC may not simply paper over these flaws by relying on privately-funded third-party analyses.⁵⁹

III. As part of the ’96 Act, Congress intended to treat services differently depending on whether the service primarily created data or the service primarily transmitted the data. Congress has chosen not to eliminate that distinction.

The proposal fundamentally misunderstands our purpose in passing the Communications Act. The proposal treats telecommunications services as though they are synonymous with information services. While some commenters may prefer this approach⁶⁰— that is not what the Act says nor is it what we intended when we crafted the law.

The Telecommunications Act of 1996 famously mentions the word “internet” only 11 times.⁶¹ It mentions the word “broadband” once. That’s because broadband was not widely used for several more years after the passage of the Act.⁶²

However that does not mean that Congress intended the fundamental principles underlying the Communications Act to become obsolete in a few years with the development of new equivalent technology. After all, the Act itself took more than six years to craft. Instead, Congress intended the principles developed in the Act to survive and persist regardless of the specific technology used. That’s why it codified a term called “advanced telecommunications services,” to anticipate new technologies.

So, what were those fundamental principles? When it comes to telecommunications, Congress intended the FCC to treat services that create content differently than those services that transmit that content. In the Act, we labeled services that create content as “information services,” which we defined as those that offer the capability to generate content among other

⁵⁶ 47 U.S.C. §1302.

⁵⁷ 47 U.S.C. §332(c)(1)(C).

⁵⁸ 47 U.S.C. §1302.

⁵⁹ Internet Freedom NPRM, *supra* n. 1, at ¶ 45.

⁶⁰ American Enterprise Institute, ‘*The Real Slow Lane*’ *Threat to the Internet* (Jun. 2, 2014).

⁶¹ Telecommunications Act of 1996, Pub. L. No. 104-104 (1996).

⁶² National Telecommunications and Information Administration, *Nation Online: How Americans are Expanding Their Use of the Internet* (2002) (www.ntia.doc.gov/legacy/ntiahome/dn/html/toc.htm).

things.⁶³ We also created a distinct classification of services that transmit information that we called “telecommunications services.” We defined these services as ones that offer telecommunications for a fee directly to the public.⁶⁴ We then defined “telecommunications” as the transmission of the content between two points of the users’ choosing without change.⁶⁵

We based this distinction on a clear policy goal that remains true today. Americans have fewer options about which networks they buy their subscription services from than they do when it comes to the information they communicate using those networks. Moreover, we were concerned that networks could use their market power to control the information that Americans could communicate online, whether for commercial or political reasons. In contrast, we intended to set strict limitations on the government’s reach into the content communicated between Americans. This was not an easy compromise to reach and should not be dismissed easily.

This distinction comes into focus when considering the technology most Americans used at the time we passed the law. Most Americans in 1996 had copper phone lines as their primary mode of telecommunications. To the extent our constituents had internet service in their home, it was likely an additional dial-up service that used the copper phone lines to connect. In fact, many of these internet services were not open, but rather curated walled gardens with only a preselected portion of the internet’s content.

To be sure, the technology has changed rapidly and continuously in the two decades since we passed the Act. Americans have migrated away from copper phone lines as their primary form of communication. Now, nearly half of Americans do not have any type of landline at home. In a total reversal from 20 years ago, many of those that do have home landline service buy it as a service that rides over their internet service.

The way Americans use the internet has changed as well. Since we voted for the Telecommunications Act in 1996, Americans rejected the curated internet services in favor of an open platform. Now, anyone with a subscription to an ISP can get access to any legal website or application of their choice. Americans’ ISPs no longer pick and choose what online services their customers can access.

While the technology has changed, the policies to which we agreed have remained firm—the law still directs the FCC to look at the network infrastructure carrying data as distinct from the services that create the data. Using today’s technology that means the law directs the FCC to look at ISP services as distinct from those services that ride over the networks.

The FCC’s proposal contravenes our intent—the FCC should tread carefully before interfering with content creation. While some may argue that this distinction should be abandoned because of changes in today’s market, that choice is not the FCC’s to make. The

⁶³ 47 U.S.C. §153(24).

⁶⁴ 47 U.S.C. §153(53).

⁶⁵ 47 U.S.C. §153(50).

decision remains squarely with those of us in Congress—and we have repeatedly chosen to leave the law as it is.

The Commission’s proposal performs a historical sleight of hand that impermissibly conflates this fundamental distinction. The FCC proposes to treat network infrastructure as information services because the infrastructure gives access to the services running over their networks.⁶⁶ The FCC contends that ISPs are therefore “offering the capability” to use the services that create the content.⁶⁷ However this suggestion obliterates the distinction that Congress set in to law—we meant for the FCC to consider services that carry data separately from those that create data. The FCC’s proposal would therefore read this fundamental choice that we made out of the law. Under the proposal’s suggestion, no service could be a telecommunications service going forward.

IV. The FCC may have inappropriately violated its independence from the White House by taking direction from the President.

Finally, the process through which the proposal was developed appears to be irreparably flawed. As Chairman Pai himself has stated repeatedly, we created the FCC as an independent agency.⁶⁸ We delegated some of our authority to the Commission, but we tried to keep communications policy isolated from the political whims of the executive branch. While the President and his administration are certainly entitled to voice an opinion, it is not permitted to direct the actions of the agency.⁶⁹

Unfortunately, this process has been wrought with indications that the President is actually directing the actions of the Commission. As an initial matter, Chairman Pai met personally with the President in the Oval Office. The Chairman has not been willing to disclose whether the President gave specific direction on what policy directions the FCC should take.

The White House has given an indication, however, that it did direct the FCC to undermine net neutrality. At a March 30 press conference, the President’s spokesperson, Sean Spicer, specifically said that the President intended to take away Americans’ privacy rights.⁷⁰ He then implied that the President intended to follow through with his campaign promises to undermine the legal foundations of net neutrality.⁷¹ Shortly after this announcement, Chairman

⁶⁶ Internet Freedom NPRM, *supra* n.1, at ¶ 27.

⁶⁷ *Id.* at ¶ 28..

⁶⁸ Federal Communications Commission, *Statement of FCC Commissioner Ajit Pai on the Release of Senate Report on How the White House Bowled Over FCC Independence* (Mar. 2, 2016).

⁶⁹ Congressional Research Service, *Administrative Law Primer: Statutory Definitions of ‘Agency’ and Characteristics of Agency Independence* (Mar. 22, 2014).

⁷⁰ See White House, Remarks of Press Secretary Sean Spicer at Press Briefing 32 (Mar. 30, 2017) (www.whitehouse.gov/the-press-office/2017/03/30/press-briefing-press-secretary-sean-spicer-3302017-32).

⁷¹ *Id.*

Pai circulated a draft proposal that tracked precisely with the announcement from the White House.

Before and after the adoption of the 2015 net neutrality order, Chairman Pai often said that President Obama improperly influenced the FCC by releasing a video supporting a path forward for net neutrality and submitting a proper ex parte filing in the docket. As has been well established, the Chairman's comments were certainly an overstatement, but the potential influence of this White House goes much further. It appears that the President directly ordered Chairman Pai to repeal net neutrality, potentially during a visit to the Oval Office. If true, this proposal clearly violates our intention to create an agency independent of the executive.

Respectfully submitted,

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