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AT THE TEXAS FORUM ON INTERNET REGULATION**

**TEXAS A&M UNIVERSITY, BUSH SCHOOL OF GOVERNMENT & PUBLIC SERVICE
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Commissioner Pai, fellow panelists, members of the Bush School of Government and Public Services, and to all those Aggies around the world watching over the Internet, I am honored to appear before you representing Data Foundry, one of Texas' very first Internet Service Providers and one of Texas' largest, carrier-neutral data center operators.

We are here today at the invitation of Commissioner Pai to discuss Internet regulation. The Commission seeks a way to implement legally enforceable rules by which it could stop broadband providers from limiting Internet openness.

I would like to reframe the issue. Where I work, we buy Internet bandwidth by the truckload, directly from Internet backbone providers. We have no issues with those backbone providers. They don't snoop, they don't slow or block our traffic in any way, and they assiduously maintain adequate capacity on their backbones and at all their peering points.

When I go home, it's a totally different story. Issues with residential broadband providers are specifically what have led us to being here at today's forum.

The risk to Internet openness only exists at home, on my residential broadband provider.

Thus, the challenge to the open Internet is not the Internet, it's the access provider.

I. The consumer broadband Internet access market in the USA is shameful

The Commission rightly raises openness as a critical issue for American Internet access. I'm not satisfied with that as the only issue. Openness is the tip of the iceberg.

Most American's don't know this, but we have among the worst broadband Internet access in the developed world. In OECD surveys, we are in the bottom 10–20% for price per megabit, and falling, we are among the few countries with rising broadband costs.

Customer service is awful. The two most hated companies in America, the ones with the lowest customer satisfaction ratings, are Time Warner Cable and Comcast. And they're about to merge.

Golden Frog, a cloud VPN provider, documented a case where a wireless broadband Internet access provider actively intervened in an email transaction, preventing it from turning on encryption.

Comcast, one of the largest ISPs in the world, implemented a "network management" practice of blocking BitTorrent connections.

We have ISPs inserting ads into our web browsing, using technology like NebuAd, or more recently, R66T.

Large consumer ISPs use their immobile customers as pawns while playing revenue games with content providers, like what Verizon and Comcast did with Netflix.

How is it that de-regulated, free-market policies have brought us the worst consumer Internet service?

The answer is that the 2005 deregulation ended up being protectionism for the incumbent Internet access providers. We have no market for broadband Internet. Most homes in the US have no more than 2 options for Internet service, and the choice is between Tweedledee and Tweedledum.

II. The proposed solution: Net Neutrality

The NPRM we are discussing today proposes to regulate carriers into behaving, but let's look at it in detail.

It may or may not (depending on interpretations and loopholes):

- Might prevent Comcast, Verizon or AT&T from crippling Netflix compared to their own video-on-demand services
- Might prevent carriers from resetting BitTorrent connections.

But, problems this NPRM will definitely not solve:

- Will not stop carriers from blocking encryption
- Will not budge the needle in moving the USA from the bottom of the OECD broadband list
- Will not stop carriers from shaking down content providers
- Will not prevent carriers from snooping traffic and injecting ads into web browsing
- Will not improve customer service from our broadband providers

Problems this NPRM will create:

- Creates an Internet access fast lane—which by definition means everyone else is in the slow lane—concentrating media power to incumbents with money
- Opens the door for carriers to snoop all of our traffic, under the rationalization of preventing discrimination
- Invokes regulation under section 706, which invites the FCC to start regulating Internet applications (so-called “edge providers”), as if they were somehow the bottlenecks like the incumbent access providers
- Implicitly enshrines and institutionalizes the cable & landline duopoly.

To boot, the FCC will only enforce the rules when a party brings a complaint to them.

The proposed solution solves little, leaves a lot broken, and creates new problems, all while inviting regulatory capture.

III. An alternate solution: Title II Common Carriage and Open Access

Is there an approach which could solve all the problems, without creating these new problems?

Backing up a step, the core problem is not the Internet. The core problem is the Internet access providers. At work, if one of our Internet backbone providers were to misbehave, we would fire them, and replace them with one of the many waiting in the wings. But consumers have no ability to punish a bad provider—except, with the proposed NPRM, to hire a small army of lawyers and take a complaint to the FCC.

But we can fix this. We can create a market which would drive a natural alignment between what's best for the consumer, and what's best for the Internet access provider.

We can provide options for consumers, with ranges of choice for cost, performance, privacy, and customer service.

We can even do this without regulatory micro-management.

The reason I'm so confident is because we've done it before. This is how the Internet was born.

In the dial-up days of the Internet, there was a rich and dynamic market for Internet Service Providers. I was the first employee at the Internet access provider Texas.Net, in 1994. We were one of the first to provide an Internet on-ramp, but a howling pack of competitors came right along at our heels. I have a copy of the Boardwatch directory from 1998, right here, cataloging all of the options.

The competition was fierce. We were constantly re-investing our profits into technology upgrades and growth. We continually expanded and tailored the service bundles we offered to meet the desires of our customers. I have some personal pride because Texas.Net won the ISP of the Year award from the Austin Chronicle in 1997 and 1999. We competed, and the consumer won.

The market for dial-up Internet options in the '90s and into the 2000s was only possible due to the categorization of POTS lines as an Open Access Network under Title II.

Open Access and Common Carriage stem from the FCC's Computer Inquiries, beginning in 1966, which created structural separation between legitimately regulated physical networks and highly diverse and competitive applications running on top of those networks. In the '90s, the POTS network was the regulated network, and dialup Internet access providers, like Texas.Net, were the unregulated but competitive application providers.

In fact, Title II Common Carriage and Open Access work so well, the same concepts were adopted by our other utilities. The Federal Energy Regulatory Commission, used the Computer Inquiries as the basis for deregulating and unbundling gas and electric delivery. Today we have robust gas and electric distribution infrastructure along with diverse competitive energy providers.

Other countries around the world took Open Access and ran with it, and are now far ahead of us. It's time for us to return to our roots, and race to catch up with the rest of the world. The UK, France and Australia are all examples of successful Open Access policies, resulting in better service than in America.

In summary, we endorse the policy of classifying last-mile layer 1 networks under Title II, and imposing Common Carriage and Open Access requirements on those networks, in order to create markets for Internet access, minimize the regulatory complexity, and best align service provider and consumer priorities.