Congress of the United States

Washington, DC 20515

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November 12, 2014

The Honorable Tom Wheeler
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Dear Chairman Wheeler:

Nine years ago, the Federal Communications Commission (FCC) adopted a policy statement espousing four principles designed to "ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers[.]" By any metric, the goals of these principles are being met and advanced by the private sector today without formal FCC rules. Recent proposals have suggested that the FCC can use its authority under Title II of the Communications Act to create legally enforceable rules to regulate Internet access. We believe this is beyond the scope of the FCC's authority and would defy the plain reading of the statute. The Commission has already tried – and failed, twice – to convert these principles into legally enforceable rules. Call it "net neutrality" or call it "the Open Internet," the result remains the same: two trips to court, two FCC losses, and nine years of uncertainty for the Internet.

Now, as the Commission considers for a third time how to craft enforceable "Open Internet" rules, you are being asked by some to reclassify broadband under Title II of the Communications Act. This isn't sound policy and would almost certainly mean another trip for the FCC to the Court of Appeals. Put simply, reclassification would require the Commission to find that Internet access is a telecommunications service, not an information service. These are not matters of opinion but distinctions made in the text of the Communications Act, the plain language of which precludes regulation of the Internet under Title II.

The legal and policy infirmities of reclassification have been well documented at the Commission. Reclassification would require the FCC to reverse nearly two decades of legally sound – and Supreme Court affirmed – reasoning that Internet access services are explicitly *not* Title II services. Justifying this course change is no easy task under current law. Among other harms, reclassification would threaten the jobs and investment made possible by the broadband industry, which the Communications Workers of America and the NAACP state accounted for more than $193 billion in capital investment and more than 270,000 jobs over the last three years. And, reclassification

would violate the plain language of section 230 of the statute, which makes it U.S. policy to "preserve the vibrant and competitive free market that presently exists for the Internet … unfettered by Federal or State regulation[.]"

In adopting section 230, Congress acknowledged that many of the concepts contained in Title II of the Communications Act harken back to the monopoly-era telephone industry and have no bearing on the modern communications marketplace. Even advocates of reclassification recognize this fact and are calling for the Commission to use its forbearance authority to apply only part of Title II. Under this approach the Commission would still ignore the language of the statute and reclassify broadband, but in order to ameliorate some of the damage this would cause to the nation's Internet economy, the Commission would then forbear from applying large parts of the law. Many proponents of forbearance suggest that this contortion will be an easy process, but the facts about forbearance do not support such a conclusion.

The Commission currently has 1,000 active rules that are based on Title II, occupying nearly 700 pages in the Code of Federal Regulations. The amount of time that the Commission would have to spend on forbearance activity would be staggering. On average, the Commission has spent more than a year considering each of the more than 140 forbearance petitions that have been filed. And of those 140 petitions filed since forbearance authority was added to the Communications Act in 1996, only half of the requests have been even partially granted. Forbearance is hardly the panacea that reclassification advocates claim.

Among the most challenging aspects of Title II for reclassification proponents is the fact that Title II *permits* discrimination. Section 202 of the Act prohibits "unjust and unreasonable discrimination" and by inference permits just and reasonable discrimination; this is an inconvenient fact for those proposing strict non-discrimination requirements on the Internet. Recently, Rep. Henry Waxman (D-CA), Ranking Member of the House Energy and Commerce Committee, offered a proposal that rightly recognizes the challenges of reclassification, but would attempt to circumvent these limits by forbearing from sections 201 and 202 of the Act. In his letter to the FCC, Mr. Waxman suggests that the Commission could use this approach to impose "bright-line rules" against paid-prioritization. Unfortunately, we believe there is no reading of the Act that permits a strict non-discrimination policy, not even Mr. Waxman's proposal.

Forbearance can only be permitted in a narrow set of circumstances. Section 10(a)(1) of the Act states that, in order to forbear, the Commission must find that:

> "enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory[.]"

The language of the forbearance standard mirrors that of sections 201 and 202 of the Act, and for good reason. Forbearance is a deregulatory tool to be used by the Commission where competition has supplanted the need for regulation. Mr. Waxman's

proposal turns forbearance authority on its head, asking the Commission to forbear not because the regulations are not needed, but because he doesn't believe the statute is strong enough. We are concerned that this misguided approach would nullify Congress' express directive that the FCC be limited to regulating unjust and unreasonable discrimination, effectively bypassing the Commission's mandate under the Act.

In order to implement the proposed changes, the Commission would have to find that competition is robust enough to negate the need for FCC rules to prevent unjust and unreasonable discrimination, only to turn around and state that the marketplace has failed to the point that the FCC must intervene. These conclusions cannot be reconciled.

Additionally, Mr. Waxman's proposal would use section 706 of the Act to impose a bright-line non-discrimination rule. However, this would require one to accept that the FCC's ancillary authority *exceeds* its direct authority in contravention of decades of legal precedent. We assert that this approach is also unsupported in law.

Further, if the Commission attempts to apply only part of Title II, or apply Title II to only part of an Internet connection, the legal and policy flaws described above still exist. Title II cannot and should not be applied to broadband Internet access, including through a so-called "hybrid" approach to reclassification.

Given the significant legal barriers to reclassification and the uncertainty that yet another appeal of the FCC's rules would bring to the Internet, we strongly urge you to reject any such reclassification proposals. As you know, we are not alone in our concerns. In May, Rep. Gene Green led twenty Democratic Members of the House in a letter calling on the Commission to reject reclassification. We urge the Commission to heed our bipartisan concerns.

Sincerely,

Fred Upton
Chairman
U.S. House of Representatives
Committee on Energy and Commerce

John Thune
Ranking Member
U.S. Senate
Committee on Commerce, Science, and Transportation

Greg Walden
Chairman
U.S. House of Representatives
Subcommittee on Communications and Technology

Roger Wicker
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Roy Blunt
U.S. Senate
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Marco Rubio
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Kelly Ayotte
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Dean Heller
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Dan Coats
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