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OVERSIGHT OF THE FEDERAL COMMUNICATIONS COMMISSION

HEARING

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

MARCH 18, 2015

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

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OVERSIGHT OF THE FEDERAL COMMUNICATIONS COMMISSION

WEDNESDAY, MARCH 18, 2015

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Committee met, pursuant to notice, at 2:34 p.m. in room SR–253, Russell Senate Office Building, Hon. John Thune, Chairman of the Committee, presiding.

Present: Senators Thune [presiding], Nelson, Wicker, Blunt, Rubio, Ayotte, Heller, Cruz, Fischer, Sullivan, Moran, Johnson, Gardner, Daines, Cantwell, McCaskill, Klobuchar, Blumenthal, Schatz, Markey, Booker, Udall, Manchin, and Peters.

OPENING STATEMENT OF HON. JOHN THUNE, U.S. SENATOR FROM SOUTH DAKOTA

The CHAIRMAN. Good afternoon. This hearing will come to order. It is great to have all five of our FCC Commissioners with us today. We want to welcome you and we have generated a bit of a crowd. Looks like there's an interest in some of these subjects I think here, Senator Nelson.

Senator NELSON. Indeed.

The CHAIRMAN. So let me just start with my remarks, and then I'll yield to my distinguished Ranking Member, the Senator from Florida, Senator Nelson, for his remarks. And then, we're going to ask the FCC Commissioners, if they could, to confine their remarks to about 3 minutes so we can get to the question and answer, which I think what everybody here around is interested in.

So welcome to today's oversight hearing on the Federal Communications Commission. Every day every single American relies on some part of our Nation's vast communications system; the Internet, the telephone, television, GPS, or the radio. An efficient, effective communications system is the bedrock of our Nation's economy and it's the tie that binds together our twenty-first century society.

The FCC sits right in the middle of America's digital world. And this is even more true following the FCC's recent decision to turn our Nation's broadband Internet infrastructure into a public utility. It is apparent from that action last month, the FCC is also potentially threatening an unpredictable agency as it struggles to operate under legal authority that was designed nearly 100 years ago and not seriously updated in decades.

To be clear, today's hearing is not a response to the Title II order, but clearly no discussion about the FCC can ignore one of the most significant and most controversial decisions in the agen-

cy's history. My views on this subject are well known. I believe there should be clear rules for the digital road with clear authority for the FCC to enforce them. I put forward a draft bill with my House colleagues to begin the legislative discussion about how best to put such rules into statute. Like most first drafts, our draft bill is not perfect.

I invite members of this Committee and stakeholders from across the political spectrum to offer us ideas on how we can improve it so that the final draft can win bipartisan support and provide everyone in the Internet world with the certainty that they need.

The FCC's recent action accomplished the exact opposite. Rather than exercising regulatory humility, the three majority Commissioners chose to take the most radical, polarizing, and partisan path possible. Instead of working with me and my colleagues in the House and the Senate on a bipartisan basis to find a consensus, the three of you chose an option that I believe will only increase political, regulatory, and legal uncertainty, which will ultimately hurt average Internet users. Simply put, your actions jeopardize the open Internet that we are all seeking to protect.

The tech and telecom industries agree on few regulatory matters, but there was one idea that unified them for nearly two decades: the Internet is not the telephone network and you cannot apply the old rules of telecom to the new world of the Internet. Three weeks ago, three regulators turned their backs on that consensus, and I believe the Internet and its users will ultimately suffer for it.

The debate over the open Internet illustrates the importance of the FCC, which makes it all the more amazing that Congress has not reauthorized the FCC since then-Representative Markey's bill was passed a quarter century ago. Indeed, the FCC is the oldest expired authorization within this Committee's expansive jurisdiction, a situation that I intend to rectify in this Congress.

Today's hearing marks the beginning of the Commerce Committee's efforts to write and pass legislation to reauthorize the FCC. I know that contentious matters like Title II divide the membership of this committee, but FCC reauthorization is an area where I believe Republicans and Democrats can and should work together. Wanting the FCC to be an effective, efficient, and accountable regulator shouldn't be a partisan goal. I know members on both sides of the aisle have common sense ideas to make the agency more responsive to the needs of consumers, Congress, and regulated companies alike and I look forward to hearing their suggestions and views. And I look forward to hearing the Commissioners' thoughts today about ways Congress can help their agency improve.

Writing a new FCC reauthorization bill should not be a one-off effort. It is my hope that the Committee will get back to regularly authorizing the Commission as part of its normal course of business. In order to do that effectively, the Committee must be diligent in its oversight. As such, the Commission should expect to come before this Committee again.

How the Commission works is just as important as what the Commission does. In addition to discussing important communications policy matters, I hope members will use today's hearing to explore the Commission's operations, processes, and budget. For ex-

ample, the FCC has requested $530 million for Fiscal Year 2016. This funding level will be the highest in the Commission's history. That alone raises eyebrows, particularly when American households continue to do more with less in this stagnant economy, but the FCC also wants to fund this increase in part by raiding the Universal Service Fund.

Paying for record high budgets by siphoning money from USF is a dangerous precedent. While members of this Committee may have varying views on the USF's efficiency, scope, and growth, one thing I think we can all agree on is that its limited funds should not be used as a reserve fund to pay for the FCC's core statutory functions. That's what the Commission's regulatory fees are for. USF funds should pay for USF services, and I don't believe the FCC should jeopardize the stability and integrity of the Universal Service Fund in order to paper over its record high budget request.

Given the significant interest in hearing from the Commission today, I do not expect this hearing will be a short one. In order to more quickly get to Members' questions, I have asked that all of the witnesses limit their oral statements to 3 minutes apiece. The longer written statements will be submitted for the record.

I look forward to hearing from our Commissioners today in what I hope will be a productive afternoon. And, with that, I would yield to my Ranking Member, Senator Nelson.

STATEMENT OF HON. BILL NELSON,
U.S. SENATOR FROM FLORIDA

Senator NELSON. Thank you, Mr. Chairman.

A few weeks ago, everybody in this room today knows that the FCC responded to the D.C. Circuit Court and responded to 4 million Americans by restoring essential protections for consumers and competition on the Internet. Obviously, there's going to be a lot of discussion today about the content and the development of those rules. And there will be much scrutiny on the legal justification that the FCC used to support its adoption of the rules.

Now, while those legal means are important, in fact, they are the statutory tools Congress gave the FCC to perform its job, and we must not lose sight of the results of this rulemaking in terms of the protections that the FCC adopted.

As this Senator has said repeatedly, as I have discussed with the Chairman, I remain open to a truly bipartisan congressional action provided that such action fully protects consumers, does not undercut the FCC's role, and leaves the agency with flexible, forward-looking authority to respond to the changes in this dynamic broadband marketplace, so much of which what we think we know today is often changed because of the rapidity of development of technology.

Many of you have heard me speak of Title X as a yet to be defined title. And I use the term as a way to think beyond the rhetoric that has now engulfed this political argument. The key question for me is we must ask: How, or is it possible, to take what the FCC has done and provide certainty that only legislation signed into law can provide? It is part of the larger debate on the appropriate role of our laws and regulations in the broadband age. And as we have that broader discussion, I invite you, Mr. Chairman

Wheeler, to continue to work with us to craft the right policies to accomplish that goal.

As important as the issue of net neutrality is to this nation, we should never forget the other vital work that is done by the FCC. With ongoing regulatory oversight over as much as one-sixth of our Nation's economy, this agency plays a critical role in ensuring universal access and promoting competition and protecting public safety and protecting consumers.

The FCC recently closed the biggest spectrum auction in history, $41 billion, and funding the nationwide public safety wireless broadband network and providing $20 billion for deficit reduction. That's huge. And it is in the midst of planning for the voluntary broadcast television incentive auction; a new form of spectrum auction that could fundamentally change the Nation's spectrum policy. Yet we can't rest and, when it comes to spectrum, continued public and private technological development will continue to put strains on our spectrum resources going forward. Congress, the FCC, and the rest of the Federal Government needs to work together to develop a smart, forward-looking spectrum policy. And I certainly, this one Senator, will certainly try to help that effort.

The FCC is also overseeing the ongoing evolution of the nation's communication networks, known as IP transition. One of the trial projects associated with IP transition is proposed in my state. I'm looking forward to an update on that.

Generally, I have concerns about how the IP transition might affect public safety; so we can get in that. And the FCC has done a lot to modernize its Universal Service Fund programs, including expanding the E-Rate program.

What one of us Senators has not been involved in E-Rate and promote it?

And this program provides critical support for our nation's schools and their libraries. The enhancements, the increased funding will help guarantee the nation's students have access to twenty-first century technology, not just some of the kids in this country.

And I also appreciate the work that the FCC has done to increase the availability of affordable high-speed broadband in rural areas around the country. I encourage you to redouble that effort to ensure there's not this digital divide that keeps going on; that urban kids get one things and rural kids get another.

I want to thank Chairman Wheeler and the FCC staff on improving the agency's consumer complaints department. Senator Udall and I sent a letter to the FCC last year asking them to upgrade the Commission's consumer complaint website to make it more user-friendly and the Chairman delivered. The new consumer complaint website is light years ahead of the previous system, and I hope that we can continue to see the additional upgrades.

I want to thank all of the five FCC commissioners for your public service. I want to thank you for subjecting yourself to five committee hearings—no, eight committee hearings in 5 days.

And, Mr. Chairman, I thank you for the privilege of serving with you on this Committee.

The CHAIRMAN. Thank you, Senator Nelson. I share that, and we'll look forward to working together on a lot of these issues in

the days and weeks and months ahead. And with our colleagues on this Committee on both sides of the aisle, some important work to be done.

We're going to start by hearing from our Commissioners starting with the Chairman, Tom Wheeler, who will kick it off and then we'll go in alphabetical order after that, with Commissioner Clyburn, Commissioner O'Rielly, Commissioner Pai, and Commissioner Rosenworcel. So thank you for being here. Welcome.

Chairman Wheeler, please proceed.

STATEMENT OF HON. TOM WHEELER, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION

Mr. WHEELER. Thank you very much, Mr. Chairman. It's a privilege to be here with my colleagues. We're five type-A individuals who have been working together for the public interest.

Let me make three quick observations in keeping with your three-minute rule. One, the open Internet decision as you indicated is a watershed. Your leadership, Mr. Chairman, has illustrated that there really aren't any differences about the need to do something. As you said today, we need clear rules. There are different approaches, to be sure.

[Disturbance in hearing room.]

The CHAIRMAN. Sorry, Mr. Chairman. Please proceed.

Mr. WHEELER. Thank you, Mr. Chairman.

As I said, there are different approaches that we take on open Internet to be sure, and I have no doubt we'll be discussing those. We've completed our work. Strong open Internet rules will soon be in place.

But let me touch on a couple other issues real quickly. One is that there's a national emergency in emergency services. Congress holds the key to that issue. The vast majority of calls to 9–1–1 services now, as you know, come from mobile. We had a unanimous decision of our Commission just a few weeks ago to require 9–1–1 location capability from wireless callers. The carriers are stepping up but delivering location information from the phone is only the front-end of the problem. There is no national policy on how to maximize the lifesaving potential that is now being delivered as the result of the carrier's activity and our rules.

There was an example, a tragic example, in Georgia just a few weeks ago. A lady by the name of Shanell Anderson who was calling from a sinking car in the middle of a lake and her call was picked up by an antennae in a different public safety answering points jurisdiction. And you can hear this heartbreaking conversation with her as she says where she is and the dispatcher keeps saying, "I can't find it. I can't find it."

Because this other jurisdiction didn't have the maps as to where this woman was all because of the vagaries of how a wireless signal gets distributed. There is a real opportunity. The 6,500 different public safety answering points are staffed by dedicated, qualified individuals, but there is an absence of a Federal program that recognized that mobile has changed the nature of 9–1–1 and we can't just worry about the signal coming from a caller. We've got to worry about what happens to make sure that that signal is used.

And just let me be real clear on one thing. This is not an FCC power grab. I don't care how this gets done, where it goes, in terms of responsibility, but we have a responsibility to Americans to make sure that the information that we as a Commission are requiring be transmitted actually can get put to lifesaving uses. And the Congress has the ability to do something about that.

My second quick issue: The broadband progress report that we recently released found that rural America is falling behind in broadband. The disparity between rural and urban America, as Senator Nelson suggested, is unacceptable. Only 8 percent of urban Americans lack high-speed broadband but 53 percent of rural Americans do. We tackled part of that with the E-Rate modernization and the rural fiber gap for schools. Forty percent of rural schools are without access to fiber. They now have alternatives under the new rules.

The Commission recently revised the support mechanism for price-cap carriers, an additional $1.8 billion from Universal Service Fund, to upgrade their activities. And in areas that are not participating began the process that will lead to an auction next year where alternative providers can step up and say, "No, I will provide service." And in an experiment leading up to that have put $100 million out to actually test alternative pathways.

We plan to act on rate-of-return carriers this year to create a voluntary path for those who elect to receive defined amount of funding to deal with the tying of voice and broadband together which is a problem that they experience, to deal with replacing the infamous QRA. And that's a process that would be greatly facilitated if stakeholders could agree on a common solution.

So I thank you, Mr. Chairman and Members of the Committee, for the opportunity to be before you. I look forward to discussing any of the issues that you want to discuss as we go further.

[The prepared statement of Mr. Wheeler follows:]

PREPARED STATEMENT OF HON. TOM WHEELER, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION

I. Introduction

Chairman Thune, Ranking Member Nelson, and Members of the Committee, I appreciate the opportunity to join with my colleagues to appear before you regarding oversight of the Federal Communications Commission.

Since becoming FCC Chairman in November 2013, I have been clear that the agency should be focused on two over-arching priorities:

> first, facilitating dynamic technological change to enable economic growth and to promote U.S. leadership; and second, ensuring that our communications networks reflect certain core civic values—universal access, competition, public safety, and consumer protection.

I have also been clear from the outset that what the agency can accomplish depends on how we do our business. Accordingly, I have made improving agency operations and processes a top priority.

Thanks to the tireless efforts of the Commission's outstanding professional staff, the agency has posted a significant record of achievement in support of these goals. I look forward to discussing these accomplishments with the Committee today and working with you and my fellow Commissioners to build on this progress and bring the benefits of broadband to all Americans.

II. Promoting Economic Growth and U.S. Leadership

Broadband Internet—wired and wireless—is the indispensable infrastructure of our information economy. A vibrant broadband ecosystem is also critical to America's global economic competitiveness. Driven by innovative American companies

and entrepreneurs, the U.S. is the clear global leaders in advanced wireless networks, devices, and applications. To enable economic growth and continued U.S. leadership, the Commission is focused on promoting fast, fair, and open broadband networks and unleashing spectrum to enable mobile innovation.

A. Fast, Fair, and Open Networks

There are three simple keys to the broadband future. Broadband networks must be fast, fair, and open. Fast networks enable new products and services and remove bandwidth as a constraint on innovation. Fair networks ensure consumers have competitive choices. Open networks allow innovation without permission and freedom of expression. The FCC's challenge is to achieve the goal of networks that are fast, fair, and open for all Americans and the equally legitimate goal of preserving incentives for investment in broadband infrastructure.

Open Internet Order

In January 2014, most of the FCC's Open Internet rules were struck down in court, eliminating the Commission's ability to be a cop on the beat—be it through principles, rules, or otherwise—to effectively deter or punish harmful behavior by ISPs. The Commission acted immediately to begin a process to restore Open Internet protections. Over the past year, we received input from nearly 4 million Americans in the one of the most transparent proceedings this Commission has ever run. There was a 130-day public comment period. We held six roundtable discussions with experts on legal, technical, and market issues. We heard from and responded to over 140 members of Congress. Our team had dozens of meetings with Congressional staff. I spoke with—and listened to—hundreds of consumers, innovators, and entrepreneurs in meetings across the country.

On February 26, 2015, after a year-long process and a decade of debate, the FCC adopted bright line Open Internet protections that ban blocking, throttling, and paid prioritization. These rules will fully apply to fixed and mobile broadband. The Order also includes a general conduct rule that can be used to stop new and novel threats to the Internet. That means there will be basic ground rules to assure Internet openness and a referee on the field to enforce them.

The FCC's *Open Internet Order* should reassure consumers, innovators, and the financial markets about the broadband future of our Nation.

Consumers now know that lawful content online will not—cannot—be blocked or their service throttled. Internet users can say what they want and go where they want, when they want—whether they access the Internet on their desktop computer or on their smartphones.

Innovators now know they will have open access to consumers without worrying about pay-for-preference fast lanes or gatekeepers. Entrepreneurs will be able to introduce new products and services without asking anyone's permission.

Financial markets now know that there will be common sense Open Internet protections in place that rely on a modernized regulatory approach that has already been demonstrated to work—not old-style utility regulation. The rules under which the wireless voice industry invested $300 billion to build a vibrant and growing business are the model for the rules the Commission adopted. That means no rate regulation, no tariffing, and no forced unbundling. The new rules ensure ISPs continue to have the economic incentives to build fast and competitive broadband networks.

Community Broadband Petitions

Last year, the leaders of Chattanooga, Tennessee and Wilson, North Carolina petitioned the FCC asking the agency to preempt laws enacted by state legislatures that prohibit them from expanding their successful community-owned broadband networks.

The Commission respects the important role of state governments in our Federal system, and we do not take the step of preempting state laws lightly. But it is a well-established principle that state laws that directly conflict with Federal laws and policy may be subject to preemption in appropriate circumstances.

Congress instructed the FCC to encourage the expansion of broadband throughout the Nation. Consistent with this statutory mandate, the Commission voted to preempt restrictive state laws in North Carolina and Tennessee that hamper investment and deployment of broadband networks in areas where consumers would benefit from greater levels of broadband service.

The Commission's action will get rid of state-level red tape, which served as nothing more than a barrier to broadband competition, and allow communities to determine their own broadband future.

Broadband Progress Report

Section 706 of the Communications Act instructs the Commission to "determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion" and report to Congress annually. Since 2010, the benchmark for advanced communications has been 4 megabits per second (Mbps) down, 1 Mps up. Four Mbps is less than the recommended capacity to stream a single HD video. Now consider that the average connected household has seven Internet-connected devices including televisions, desktops, laptops, tablets, and smartphones. If you were to look at the ISPs marketing materials, they recommend speeds of 25 Mbps or higher if you plan on using multiple connected devices at the same time.

In January, the Commission established a new definition for advanced telecommunications capability as 25 Mbps down, 3 Mbps up. This new standard already holds for 83 percent of U.S. homes. But we have a problem when 17 percent of U.S. households can't access broadband at this new standard, with rural and Tribal areas disproportionately left behind. This new standard is an impetus for meaningful improvements in the availability of true high-speed networks for all Americans and also an invitation to innovation that is enabled by increased throughput.

Removing Barriers to Broadband Deployment

The private sector must play the leading role in extending fast, fair, and open broadband networks to every American. That's why the FCC is committed to removing barriers to investment and to lowering the costs of broadband build-out. We have made great strides in this area in the past year, and there is more to come. Last August, we substantially reformed tower lighting and marking requirements, which greatly eased compliance burdens for tower owners without any adverse impact on aviation safety. In October, we adopted changes to facilitate the process—at the Federal and state level—for deploying small-cell wireless systems and other installations that have no impact on historic properties.

Looking ahead, we have launched an effort to streamline further the Federal review for deployments of the small cell and distributed antenna systems that will power wireless broadband in the future. We have committed to wrapping up this effort by mid-2016, which is an aggressive schedule considering the wide consultation we are required to pursue with all stakeholders, including the Advisory Council on Historic Preservation, Tribal Nations, and State historic preservation offices.

We have also been working closely with industry and other stakeholders to craft an approach to bring into compliance towers that may have been built without the historic preservation reviews required by statute. Once complete, this will open up thousands of towers for collocations, eliminating the need for new construction and excavation in many cases. The tower industry is working directly with us on this initiative, and they have committed to providing us with information about these towers by early June.

In addition, we have launched a project to modernize the Tribal Nation consultation by establishing clear parameters for the information tower constructors must provide and the deadlines that apply to any responses or objections from Tribal Nations.

Finally, we recognize that industry can face greater expense and delay when a project's Federal funding or physical location requires them to work with disparate Federal agencies to gain approval. To address this, we are taking the lead with our Federal agency partners—including FirstNet, the Rural Utility Service, and the Federal Railway Administration—to clarify and simplify the Federal review process in cases of overlapping jurisdiction.

B. Spectrum

No sector holds more promise for new innovations that will grow our economy, create jobs, and improve our quality of life than mobile broadband. Consider that the "app economy" didn't exist until 2008, and it is already sustains more than 600,000 U.S. jobs. Mobile is also an essential pathway to the Internet, accounting for more than 60 percent of Internet usage. Spectrum is the oxygen that sustains our mobile networks, and more spectrum is needed to meet the increasing demand for mobile broadband. In 2014, the spectrum pipeline re-opened, and the Commission is working to make sure more spectrum can and will be made available on terms that promote competition and consumer choice.

AWS–3 Auction

Auctions are one of the Commission's tools to meet the Nation's demand for wireless broadband. This January, we closed bidding on The AWS–3 auction (Auction 97), which was a huge success. It marked a new era in spectrum policy, where a

collaborative and unprecedented effort resulted in new commercial access to Federal spectrum bands. A bipartisan group of leaders in Congress, Federal agencies—especially NTIA and DOD, industry, and the team at the FCC all came together to help meet the Nation's demand for wireless broadband.

The AWS–3 auction made available an additional 65 megahertz of spectrum to improve wireless connectivity across the country and accelerate the mobile revolution that is driving economic growth and improving the lives of the American people. It also generated more than $41 billion in net bids. In particular, this auction will fully fund $7 Billion for FirstNet's nationwide public safety broadband network. It will also deliver $300 Million to public safety; $115 Million in grants for 911, E911, and NextGen 911 implementation; and more than $20 Billion for deficit reduction; all while paying for the spectrum relocation efforts of DOD and other Federal agencies.

H-Block

The spectrum spigot was re-opened in February 2014, when the Commission auctioned the 10 megahertz H-Block. This was the first major auction of mobile broadband spectrum since 2008. The H-Block auction succeeded in putting this spectrum to work in the marketplace and raised more than $1.5 billion, much of which served as a down payment on the deployment of FirstNet's public safety network.

Incentive Auction

All eyes are now on the upcoming Incentive Auction. Such attention is warranted. This first-in-the-world auction could revolutionize how spectrum is allocated. By marrying the economics of demand with the economics of current spectrum holders, the Incentive Auction will allow market forces to determine the highest and best use of spectrum, while providing a potentially game-changing financial opportunity to America's broadcasters.

The FCC staff has been working tirelessly to design the auction ever since Congress authorized it in February 2012. In May 2014, the Commission adopted a Report and Order that set out the ground rules for the auction.

This past December, we initiated a public comment period, making detailed proposals about how key aspects of the auction will work.

We realize that broadcasters' participation is critical to the success of the Incentive Auction, and we are continuing our broadcaster outreach and education efforts. In February 2015, the Incentive Auction Task Force released an updated information packet, which, for the first time, has opening bid prices, based on the proposals in the Commission's December Public Notice. The Task Force has also started holding its field visits in every region of the Continental U.S., including both larger and smaller television markets.

Thanks to these efforts, we are on track to conduct an Incentive Auction in the first quarter of 2016. We are confident that there will be high demand for this valuable low-band spectrum, which will help ensure a successful auction.

Mobile Spectrum Holdings

The Commission is not only committed to making available more spectrum for mobile broadband, it is also committed to promoting competition in the mobile marketplace. In May 2014, the Commission adopted a reasonable, balanced Report and Order updating our mobile spectrum holding policies to ensure a healthy mobile marketplace with clear rules of the road for spectrum aggregation. In particular, the Order will help ensure competitive access to "low-band" spectrum that we will make available in the Incentive Auction, which is best suited for transmitting wireless communications over long distances and through walls. Such low-band spectrum is critical to companies' ability to compete in today's wireless marketplace.

Unlicensed Use (5 GHz)

The Commission is working to make available not only licensed spectrum, but also unlicensed spectrum, which has enabled breakthrough innovations like Wi-Fi and Bluetooth. In March 2014, the Commission adopted an order to take 100 MHz of unlicensed spectrum at 5 GHz that was barely usable—and not usable at all outdoors—and transform it into spectrum that is fully usable for Wi-Fi. This was a big win for consumers who will be able to enjoy faster connections and less congestion, as more spectrum will be available to handle Wi-Fi traffic. But we cannot stop there. We have been and will continue work with our Federal partners and the transportation industry to find technical solutions that will enable the use of an additional 195 megahertz of spectrum for shared unlicensed use in the 5 GHz band.

Citizen's Broadband Service (3.5 GHz)

Spectrum sharing is another Commission policy with potential to transform spectrum management. In April 2014, the Commission took a significant step toward turning the spectrum sharing concept into reality, adopting a Further Notice of Proposed Rulemaking to enable innovative spectrum sharing techniques in the 3.5 GHz band. Our three-tiered spectrum access model, which includes Federal and non-federal incumbents, priority access licensees, and general authorized access users, could make up to 150 MHz of spectrum available for wireless broadband use. I plan to present an Order establishing final rules for this band to my fellow Commissioners in the near future.

"5G" Spectrum Frontiers

An effective spectrum strategy requires an all-of-the-above approach. This means making more spectrum available for not only licensed but unlicensed uses; for both exclusive use and sharing. It also means exploring entirely new spectrum opportunities. In October, the Commission adopted a Notice of Inquiry to explore the possibility of facilitating the use of a huge amount of spectrum in higher frequency bands, those above 24 GHz, which could be used strategically to help meet the growing demand for wireless broadband. Some in the industry are referring to the use of these bands in the context of so-called "5G." The NOI is about encouraging next-generation wireless services, and is also designed to develop a record about how these technologies fit into our existing regulatory structures, including how they can be authorized, to make sure we are facilitating and not unduly burdening their further development.

III. Protecting Core Values

Changes in technology may occasion reviews of our rules, but they do not change the rights of users or the responsibilities of network providers. The Commission must protect the core values people have come to expect from their networks: universal access, competition, consumer protection, and public safety and national security.

A. Universal Access

Universal access to communications has been at the core of the FCC's mission since the agency was established 80 years ago. Considering access to broadband is increasingly necessary for full participation in our economy and democracy, connectivity for all is more important than ever. Our universal service programs promote access to technology at home, at work, in schools or libraries, or when seeking assistance from a rural healthcare clinic. The Commission must ensure that our programs keep up with the changing technologies, are well-managed and efficient, while limiting waste, fraud, and abuse. Above all, we must make sure that the infrastructure supported by the Commission is available to ALL, including low-income Americans, individuals living on Tribal lands, and individuals with disabilities.

Connect America Fund

While the private sector must play the leading role in extending broadband networks to every American, there are some areas where it doesn't make financial sense for private companies to build. That's why the Commission modernized our Universal Service Fund to focus on broadband, establishing the Connect America Fund. Already, the Connect America Fund (CAF) has made investments that will make broadband available to 1.6 million previously unserved Americans.

In December 2014, the Commission approved an Order to move forward with Phase II of the Connect America Fund, putting us on the path to potentially bring broadband networks and services to over 5 million rural Americans.

The long-term success of the Fund will be measured not just by the number of newly-served Americans, but by the quality of the networks that are being deployed. That's why the December Order increased the minimum download speed required as a condition of high-cost support to 10 megabits per second, up from 4 megabits per second.

Rural Broadband Experiments

Fulfilling our statutory mission to deliver on the promise of universal service in rural America challenges us to think anew, and act anew. In January 2014, the FCC initiated an experiment to inform our policies to build next-generation networks in rural America. We invited American enterprises, communities and groups to tell the FCC whether there is interest in constructing high-bandwidth networks in high-cost areas, and to tell us how it could be done with Connect America Fund support.

In July, we adopted an Order establishing a $100 million budget for the rural broadband experiments, criteria for what we expect from applicants, and an objective, clear-cut methodology for selecting winning applications. These experiments will allow us to explore how to structure the CAF Phase II competitive bidding process in price-cap areas and to gather valuable information about deploying next-generation networks in high-cost areas.

E-Rate Modernization

E-rate—America's largest education technology program—has helped to ensure that almost every school and library in America has the most basic level of Internet connectivity. In the 18 years since E-rate was established, technology has evolved, the needs of students and teachers have changed, and basic connectivity has become inadequate.

This past July, the Commission approved the first major modification of E-rate in the program's 18-year history. The overhaul accomplished three overarching objectives:

First, for the first time, the Commission set specific, ambitious speed targets for the broadband capacity delivered to schools and libraries: a minimum throughput of 100 Mbps per 1,000 students and a pathway to 1 Gbps per 1,000 students.

Second, we refocused the program away from funding 20th century technologies like pagers and dial-up phone service toward supporting 21st century high-speed broadband connectivity. In the process, we moved to close the Wi-Fi gap by ensuring that over the next two years an additional 20 million students will have Internet access at their school or library desk.

Third, we took steps to improve the cost-effectiveness of E-rate spending through greater pricing transparency and through enabling bulk purchasing to drive down costs and give Americans who contribute to E-rate on their monthly bills the most bang for their buck.

In December, we took the final major step in rebooting how we connect our students to 21st century educational opportunity by increasing the level of annual E-rate investment. The increase is justified by data showing 63 percent of American schools—and higher percentages in low-income and rural areas—do not currently have an Internet connection capable of supporting modern digital learning.

Enhanced Closed Captioning

Reliable and consistent access to news and information for deaf and hard-of-hearing communities is not a luxury, it is a right. In February 2014, the Commission adopted rules to provide standards for better quality closed captioning on TV programming. Members of the deaf and hard-of-hearing community, alongside industry—NCTA, NAB, and MPAA—stepped up to the plate to help craft a set of rules that moves us toward improving captioning quality, while also assuring that vital news and other types of programming provide captioning. Building on this progress, we adopted an Order in July that requires captioning for video clips that are posted online.

B. Competition

The central underpinning of broadband policy today is that competition is the most effective tool for driving innovation, investment, and consumer and economic benefits. Our competition policy is simple. Where competition does exist, we will protect it. Where competition can exist, we will incent it. And where competition cannot be expected to exist, we must shoulder the responsibility of filling that void. Many of the actions already highlighted in my testimony, such as approval of the two community broadband petitions and the Connect America Fund's investments to bring broadband to unserved areas, are consistent with these principles.

Multichannel Video Programming Distribution Services (MVPD)

Some new entrants have alleged that their efforts to develop competitive services have faltered because they could not get access to programming content that was owned by cable networks or broadcasters. Last December, the Commission moved to give video providers who operate over the Internet—or any other method of transmission—the same access to programming that cable and satellite operators have.

More specifically, we adopted an NPRM that proposes updating our interpretation of the definition of a multichannel video programming distributor (MVPD) to make it technology-neutral. Under our proposal, any providers that make multiple linear streams of video programming available for purchase would be considered MVPDs, regardless of the technology used to deliver the programming. The effect of this change will be to improve the availability of programming that over-the-top providers need and consumers want. By facilitating access to such content, we expect Internet-based linear programming services to develop as a competitor to cable and

satellite. Consumers should have more opportunities to buy the channels they want instead of having to pay for channels they don't want.

Access to Last Mile Connections

Small and medium-sized businesses, schools, hospitals, and other government institutions often rely on services delivered by competitive broadband and phone providers. But competitive providers may no longer be able to reach customers if incumbent carriers withdraw certain "last mile" services. Last November, the Commission adopted an NPRM that tentatively concludes that carriers seeking to discontinue a service used as a wholesale input should be required to provide competitive carriers equivalent wholesale access going forward. The NPRM also proposes to update the FCC's rules so that competitive carriers receive sufficient notice of when copper networks are being shut off, so that they can continue to serve their customers effectively.

Joint Sales Agreements

In March 2014, the Commission closed a loophole in our attribution rules for TV Joint Sales Agreements (JSAs) that had been exploited by some to circumvent our local TV ownership limitations. By prohibiting arrangements that have the full effect of common ownership—by stations' own admission in their SEC filings—we will protect viewpoint diversity and competition goals. We have also been clear to point out, however, that where we find that an agreement serves the public interest, we will waive our rule and do so through an expedited process.

Merger Reviews

Congress has directed the Commission to review transactions (involving licenses and authorizations) under the Communications Act and to determine whether the proposed transaction would serve "the public interest, convenience, and necessity." While I can't comment on the specific transactions currently before the Commission, I would note that the "public interest" standard encompasses the broad aims of the Communications Act, which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private-sector deployment of services, and ensuring a diversity of information sources and services to the public.

C. Public Safety

Public Safety is one of the primary and essential missions of the Commission, and it cannot be left behind in this technological revolution. Consumers rightfully expect to be able to reach emergency responders, and those responders need to be able to locate those in need, as well as be able to communicate between themselves. The Commission has taken steps toward these goals.

Text-to-911

In certain circumstances, such as domestic violence or kidnapping situations, texting 911 may be the only practical way to get help. In almost all circumstances for people who are deaf or hard-of-hearing, texting is the primary means for reaching out for emergency assistance. But most Americans still can't reach 911 via text. Last August, the Commission adopted an Order that required all wireless carriers and certain IP-based text messaging providers to support text-to-911 by the end of 2014. Now, if a 911 call center requests text-to-911, text messaging providers have six months to deploy the service in that area.

E–911/Location Accuracy

Our E–911 location accuracy rules were written when wireless phones were a secondary means of communication, and were mostly used outside. Today, more and more consumers use wireless phones as their primary means of communication, and more and more 911 calls are coming from wireless phones, from indoors. This January, the Commission updated its E–911 rules to include requirements focused on indoor location accuracy. The new rules are intended to help first responders locate Americans calling for help from indoors, including challenging environments such as large multi-story buildings. They establish clear and measureable timelines for wireless providers to meet indoor location accuracy benchmarks, both for horizontal and vertical location information. The new rules were an important step forward, but by no means are we done. We established a floor, but so long as private app developers can locate consumers more accurately than a 911 call-taker can, we still have work to do.

Network Reliability

The transition to IP-based networks presents potential new vulnerabilities to 911 service. The process of routing and completing a 911 call now often involves multiple

companies, sometimes geographically remote from where the call is placed. And in 2014 we saw a trend of large-scale "sunny day" 911 outages—that is, outages not due to storms or disasters but instead caused by software and database errors. In November, the Commission adopted an NPRM proposing a 911 governance structure that would ensure that technology transitions are managed in a way that maximizes the availability, reliability, and resiliency of 911 networks, as well as the accountability of all participants in the 911-call completion process. That same month, the Commission adopted a separate NPRM regarding the transition to all-IP networks, which calls for an examination of potential strategies for providing back-up power during lengthy commercial power failures.

D. Consumer Protection

Consumers must be able to depend on fast, open, and fair communications networks without being subject to discriminatory or predatory behavior. I have often stated that the best consumer protection is competitive choice. I also believe a multistakeholder process where industry rapidly adopts processes and procedures can be faster and more nimble than the regulatory process. But, at certain points, having regulation is necessary.

Record-Breaking Enforcement Actions

2014 was a record-breaking year for enforcement actions on behalf of consumers. In August, the Commission fined Time Warner Cable $1.1 million for failure to comply with our network outage requirements. In September, our Enforcement Bureau reached a $7.4 million settlement with Verizon to resolve an investigation into the company's use of personal consumer information for marketing purposes. In October, the Commission announced a $105 million settlement with AT&T Mobility to resolve an investigation into allegations that the company billed customers millions of dollars in unauthorized third-party subscriptions and premium text messaging services—the largest enforcement action in FCC history. Later in October, the Bureau proposed fining TerraCom, Inc. and YourTel America, Inc. $10 million for storing the personal information of up to 305,000 customers online in a format accessible through a routine Internet search. In December, the Commission announced a settlement of at least $90 million with T-Mobile to resolve an investigation into cramming allegations.

Sports Blackout Repeal

In September, the Commission repealed its sports blackout rules, which prohibited cable and satellite operators from airing any sports event that had been blacked out on a local broadcast station. The sports blackout rules are a relic from the days when gate receipts were the National Football League's principal source of revenue and most games didn't sell out. The FCC will no longer be complicit in preventing sports fans from watching their favorite teams on TV.

Cell Phone Unlocking

Consumers who fulfill the obligations of their mobile phone contracts should be able to take device to a network of their choosing without fear of criminal liability. One month after I became Chairman, the FCC secured an industry commitment to adopt voluntary industry principles for consumers' unlocking of mobile phones and tablets. This February, the country's major carriers confirmed that they have fulfilled their commitment. I also applaud Congress for passing legislation last summer to make cell phone unlocking the law of the land.

Tech Transitions

As part of our November NPRM facilitating the transition from copper networks to IP networks, we proposed greater transparency, consumer protection, and opportunities for consumer input when carriers are planning to shut down (or "retire") their existing copper networks. We also set in motion a process to ensure that new services meet the needs of consumers before carriers are allowed to remove legacy services from the marketplace.

Retransmission Consent

Congress created the retransmission consent regime over 20 years ago. Congress intended TV stations would negotiate retransmission consent agreements on their own. Increasingly, though, stations in a local market that are separately owned have banded together to negotiate for retransmission consent fees, even though they otherwise would compete against each other for those fees. In March 2014, the Commission adopted new rules to prohibit joint retransmission consent negotiations by same-market TV stations that are both ranked in the Top 4 in order to level the playing field and to potentially keep such agreements from unfairly increasing cable

rates for consumers. This step preceded Congress's expansion of the ban on retransmission consent to any two same-market TV stations.

IV. Modernizing the Commission

It's not enough for the FCC to put in place policies that help foster the communications networks of the 21st century; the Commission itself must become more agile and business-like in order to become more effective, efficient, and transparent.

Early last year, a Staff Working Group presented a Process Reform Report to the Commission as an important first step, and we sought comment from the public on the recommendations that were identified within that Report.

Guided by this Report, we have been moving forward with changes to streamline how the Commission functions so we are better able to serve the entities we regulate, as well as the American public. For example, we now use a Consent Agenda at Commission meetings to facilitate quick action on non-controversial items that require a Commission vote, and we have made significant progress toward all-electronic filing and distribution of documents.

Every Bureau and Office with responsibility for responding to requests from external petitioners and licensees has developed a backlog reduction plan. And last year, we also closed more than 1,500 dormant dockets.

In early 2015, we launched a new online Consumer Help Center, which will make the FCC more user-friendly, accessible, and transparent to consumers. The new tool replaces the Commission's previous complaint system with an easier-to-use, more consumer-friendly portal for filing and monitoring complaints. In addition to being easier to use for consumers, the information collected will be smoothly integrated with our policymaking and enforcement processes.

The Commission's efforts to modernize operations have been hamstrung by level appropriations since 2013. In particular, we need to upgrade our IT infrastructure; we have more than 200 relic IT systems that are costing the agency more to service than they would to replace over the long term. I believe these investments are essential and will payback in dividends with the increased efficiency gained.

I am aware of this Committee's interest and efforts with respect to modernizing our processes, including consolidating some of our reporting requirements, and will be happy to be of assistance, if requested.

V. Conclusion

The Commission has focused on harnessing the power of communications technology to grow our economy and enhance U.S. leadership, while preserving timeless values like universal service. As my testimony reflects, we have made significant progress toward these goals to the benefit of the public.

I recognize and appreciate the ongoing Congressional interest in Commission actions and process reforms. I pledge transparency and cooperation, as well as assistance, where requested, and look forward to working with Members of this Committee to maximize the benefits of communications technology for the American people.

The CHAIRMAN. Thank you, Chairman Wheeler.
Commissioner Clyburn.

STATEMENT OF HON. MIGNON L. CLYBURN, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Ms. CLYBURN. Chairman Thune, Ranking Member Nelson, Members of the Committee, good afternoon. My written statement details my views on some of the difficult decisions facing the FCC. For purposes of my oral summary, however, I will focus on just two. While I prefer competition over regulation, the truth is that marketplace nirvana does not always exist and here are two examples where markets have failed and regulatory backstop is needed.

I made rural call completion a priority as Acting Chair because it is unacceptable in this day and age that calls are not being put through. We tackled this practice by prohibiting a ringing signal unless a call is actually completed and we have required carriers to retain and report call data. Data collection rules go into effect

April first and we will use this information to ensure that the FCC has the tools necessary to take additional action if appropriate.

While a petition requested relief from egregious inmate calling rates remains pending at the FCC for nearly a decade, fees and rates continue to increase. Calls made by deaf and hard of hearing inmates top $2.26 per minute, add to that an endless array of fees; $3.95 to initiate a call, a fee to set up an account, another fee to close an account, a fee to use a credit card, there is even a fee charged to users to get a refund of their own money. There are 2.7 million children with at least one parent incarcerated and they are the ones most punished. And the downstream cost of these inequities are borne by us all.

The FCC finally adopted interstate rate caps in August of 2013. And what has been the result? Despite dire predictions of losing phone service and lapses in security, we have actually seen increased call volumes as high as 300 percent and letters to the FCC expressing how this relief has impacted lives. I hope we answered the call with permanent rate caps and fees for all of these customers this summer.

I am grateful, Mr. Chairman and Ranking Member, for the opportunity to appear before you today and look forward to answering any questions you many have. Thank you.

[The prepared statement of Ms. Clyburn follows:]

PREPARED STATEMENT OF HON. MIGNON L. CLYBURN, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Chairman Thune, Ranking Member Nelson and members of the Committee, good afternoon.

What a privilege it is for me to come before you today. It has been nearly three years since our last appearance and it is amazing just how much has changed. I had the distinct honor of serving as Acting Chairwoman for 5 ½ months, and since May of 2012 this Nation has witnessed dynamic growth and tremendous innovation: faster broadband speeds, an apps and services explosion, fresh competitors entering the market and a seemingly endless demand for spectrum. According to industry estimates, broadband providers invested $69 billion in network infrastructure in 2012, $72.2 billion in 2013 and $75.2 billion in 2014.

But none of this phenomenal growth happens organically. The FCC, more often than not on a bipartisan basis, has worked hard to enable this magnitude of development. These sometimes difficult decisions, by way of policy, have promoted and made possible incredible levels of investment and competition and while I would quickly exceed my five minutes if I were to identify every item the FCC has enabled to that end, I would like to highlight just a few.

One thing that sets our great nation apart is our unwavering commitment to universal service. Regardless of where you live, we stand by that obligation to you. The FCC reformed its universal service and intercarrier compensation programs and put this country on a path to close the broadband gap. We take it for granted now, but this decision was an incredibly significant feat involving some difficult moments that followed a decade of good faith efforts which faltered. Since 2012, I am proud to say, the FCC—through its reforms—has authorized funding to serve over 630,000 locations, or approximately 1.7 million people, in 45 states, plus Puerto Rico, with fixed broadband for the first time, provided mobile coverage to tens of thousands of road miles and connected over 50,000 people living on Tribal lands with access to mobile broadband. And we are poised to offer incumbent carriers the right to accept funding to deploy broadband within the states they serve very soon. For Americans living in these states, broadband access will be life changing.

We took action to close connectivity gaps within our schools and libraries and ensure that rural health care providers have access to the telecommunications and broadband services their communities need and deserve.

The one universal service program that has yet to be reformed, however, is Lifeline—our only adoption program which was established in 1985 and has been stuck there ever since. I am proud that this FCC took a bold step in 2012 to clean up

a program that lacked the necessary checks and balances needed to curb waste, fraud and abuse. We took sweeping action to combat major deficiencies and this has resulted in savings to the program and consumers of over $2.75 billion. That bears repeating. This administration restructured this single universal service program to the tune of $2.75 billion in savings, and it doubled down on our commitment to enforcement by proposing forfeitures of over $90 million for providers we found were not following our rules.

While these accomplishments are incredibly significant, we refuse to rest on our laurels. We need a new, restructured, recalibrated, modern-era Lifeline program that bears no resemblance to the program we have today. At AEI last November, I outlined five principles to guide Lifeline reform, all which I believe are necessary to protect the integrity of the fund, bring dignity to the program, and encourage broader participation and more competition. Key to any reform is removing the provider from determining whether a customer is eligible. Having the provider determine eligibility has created negative incentives, led to significant privacy concerns for consumers, and increased administrative burdens that have discouraged more providers from participating. We also need to demand more "product" for each dollar of universal service support spent. One little-known Lifeline fact: Of all the Federal beneficiary programs from Medicaid, to Supplemental Nutrition Assistance Program (SNAP), to the National School Lunch Program, to public housing, Lifeline has the smallest level of annual expenditures. At $9.25 a month, it reaches the greatest number of households of any program except Medicaid. If reformed properly, this program could once and for all enable consumers to have true robust broadband and prove to be one of the greatest investments this government could make.

While I generally prefer competition over regulation, the truth is that marketplace nirvana does not always exist. There are times when the communications ecosystem fails to properly address consumer interests and when that occurs, the Federal Communications Commission must step up to the plate.

The alarmingly high rate of calls not being completed to rural areas is one such example. I was proud to adopt an Order while Acting Chairwoman that tackled this unacceptable practice. The FCC has taken a number of significant actions against providers to put a stop to this, but we have much more to do. Rural call completion challenges highlight the need for a regulatory backstop, particularly when the private sector alone is unwilling or unable to resolve a concern that has public safety and business implications.

Another glaring example of market failure and the need for regulatory backstop comes in the case of inmate calling services. A decade after a petition requested relief from egregiously high and patently unlawful fees, the market not only failed to respond, things got worse. Families, friends, lawyers, and clergy paid rates as high as $2.26 per minute for a call placed by deaf or hard of hearing inmates, plus an endless array of fees, including up to $3.95 to initiate a call, a fee to set up an account, another fee to close an account, a fee to use a credit card, and even a fee charged to customers when they are refunded their own money.

Regardless of your views when it comes to the accused or the convicted, there are 2.7 million children with at least one parent incarcerated. They are the ones actually being punished by this unjust and unreasonable inmate calling structure. In addition to the anxiety associated with a parent who is absent on a daily basis, these young people suffer severe economic and personal hardships, are more likely to do poorly in school, and all of this is exacerbated by an unreasonable rate regime that limits their ability to maintain contact. Reputable studies show that having meaningful communication beyond prison walls can make a real difference when it comes to maintaining community ties, promoting rehabilitation and reducing recidivism.

We took a critical first step while I was Acting Chairwoman in August 2013 and despite the parade of horribles that opponents to inmate calling services reform predicted would flow—from losing phone service entirely to security lapses—we have witnessed nothing of the sort. What we have seen is increased call volumes of 70 percent, including one report of a 300 percent increase, and letters explaining how reforms have impacted their lives. But we are not done and our job remains unfinished unless the intrastate calling regime (where the bulk of the traffic takes place) is also reformed.

We have also adopted significant policies in the wireless market. In March 2014, we unanimously approved licensing and service rules to auction 65 megahertz of spectrum in the AWS–3 bands. This auction, which closed this past January, was the first auction of multiple paired blocks of spectrum the Commission had held in six years. Since mid-2010, we have witnessed explosive consumer demand for mobile broadband services. So this auction was important to give wireless carriers the spectrum they need to meet the demand on their networks.

But it was also important to meet Congress's directives to design an auction that promotes more competitive options for wireless consumers. My colleagues and I agreed on a band plan that included smaller license blocks and geographic license areas and we also agreed to mandate interoperability between the AWS–1 and AWS–3 bands.

Such rules encourage participation by carriers, who may have a smaller service footprint than nationwide providers, yet possess a strong desire to acquire more spectrum in order to serve a particular footprint. This approach promotes competition in local markets and has the added benefit of ensuring that the auction promotes efficient allocation of spectrum to the highest and best use.

Most predicted that increased consumer demand for mobile services would result in robust bidding for the AWS–3 auction. But no analyst predicted that the total amount of winning bids would exceed $18 billion. In fact, the final gross total winning bids was a record setting $44.89 billion. The success of this auction was due, in large part, to a painstaking effort to pair the 1755 to 1780 and 2155 to 2180 bands. This effort involved the broadcast and wireless industries, Federal agencies and members of this Committee. I commend all stakeholders for reassessing what really matters, finding common ground and doing the right thing for the American public.

We should follow a similar collaborative approach as we work towards finalizing rules to implement the world's first ever voluntary incentive auction. Encouraging smaller carriers to participate is also important to the success of this auction, as we must incentivize broadcast TV stations to take part in the reverse auction. So I am glad large and small carriers developed a consensus band plan that allowed us to shift from large Economic Areas to smaller Partial Economic Areas. We also unanimously adopted a Notice of Proposed Rulemaking that seeks to strike the proper balance between licensed and unlicensed services and accommodate the needs of incumbent services in the TV bands.

It was important to initiate a proceeding to update our Competitive Bidding rules and procedures in advance of the incentive auction. This auction will offer applicants a historic opportunity to acquire substantial amounts of valuable wireless spectrum below 1 GHz. We proposed comprehensive reforms that will enable small businesses to compete more effectively in auctions and sought comment on whether we should do more to deter unjust enrichment.

Finally, I would like to highlight the progress we are making in implementing the STELA Reauthorization Act of 2014. As required under the statute, the FCC has established a working group of technical experts to study and recommend a downloadable security system that can be used in conjunction with navigation devices, such as set-top boxes, to promote greater competition for such devices. The statute requires us to issue a report on this issue by September, and the Commission is hard at work to accomplish this milestone.

I am grateful for the opportunity to appear before you today and look forward to answering any questions you may have on how the FCC can continue to promote greater access to communications technologies and services for all Americans. Thank you.

The CHAIRMAN. Thank you, Commissioner Clyburn.

Commissioner O'Rielly.

STATEMENT OF HON. MICHAEL O'RIELLY, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Mr. O'RIELLY. Thank you, Mr. Chairman, Ranking Member Nelson, and Members of the Committee for the opportunity to deliver testimony to you today. I have always held this Committee in the highest regard given my past involvement as a Congressional staffer with oversight hearings and legislative efforts. I recommit myself to being available as any resource I can and be of any help in the future.

In my time at the Commission, I have enjoyed the many intellectual and policy challenges presented by the innovative and ever-changing communications sector. It is my goal to maintain friendships, even when my fellow Commissioners and I disagree, and seek out opportunities where we'll work together.

To provide a brief snapshot, I have voted with the Chairman on approximately 90 percent of all items. Unfortunately, the percentage drops significantly to approximately 62 percent for the higher-profile Open Meeting items.

One of the policies I've not been able to support is the insertion of the Commission into every aspect of the Internet. The Commission pursued an ends to justify the means approach to subject broadband providers to a new Title II regime without a shred of evidence that it's even necessary. Even worse, the Order punts authority to FCC staff to review current and future Internet practices under vague standards such as just and reasonable, unreasonable interference or disadvantage, and reasonable network management. This is a recipe for uncertainty for our nation's broadband providers and, ultimately, edge providers.

Nonetheless, I continue to suggest creative ideas to modernize the regulatory environment to reflect the current marketplace, often through my public blog. For instance, I've advocated that any document to be considered in Open Meeting should be made publicly available on the Commission's website at the same time it's circulated to the Commissioners, typically 3 weeks in advance.

Under the current process, I meet with numerous outside parties prior to an Open Meeting, but I'm precluded from telling them, for example, having read the document, that their concern is misguided or already addressed. The stated objections to this approach, presented under the cloak of procedural law, are really grounded in resistance to change and concerns about resource management.

In addition, the Commission has questionable post-adoption processes that deserves significant attention. While I generally refrain from commenting on legislation, I appreciate the ideas put forth by Senators Heller and others, which would address these and other Commission practices, such as the abuse of delegation that block the public out of critical end-stages of the deliberative process. I believe that these proposed changes, as well as others, would improve the functionality of the Commission and improve consumer access to information.

Separately, I have also been outspoken on many substantive issues, such as the need to free up spectrum resources for wireless broadband, both licensed and unlicensed.

I look forward to working with my colleagues on this and many other issues in the months ahead. And I stand ready to answer any questions you may have.

[The prepared statement of Mr. O'Rielly follows:]

PREPARED STATEMENT OF HON. MICHAEL O'RIELLY, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Thank you, Mr. Chairman, Ranking Member Nelson and the Members of the Committee for the opportunity to deliver testimony to you today. I have always held this Committee in the highest regard given my past involvement, as a Congressional staffer, with oversight hearings and legislative efforts to reauthorize the Commission. Not only did these experiences afford me the opportunity to work and form friendships with a number of the Committee staff on both sides of the aisle, but I am also well aware of your responsibilities and the challenges of conducting Congressional oversight. I recommit to making myself available as a resource if I can be of any assistance to the Committee in the future.

In my time at the Commission, I have enjoyed the many intellectual and policy challenges presented by the innovative and ever-changing communications sector. In addition, I have appreciated the opportunity to meet and work with many of the Commission's dedicated public servants, including my colleagues here today. It is my goal to maintain friendships even when we disagree, and seek out opportunities where we can work together. To provide a brief snapshot, I have voted with the Chairman on approximately 90 percent of all items. Unfortunately, this percentage drops significantly—to approximately 62 percent—for the higher-profile Open Meeting items.

One of the policies I have not been able to support is the insertion of the Commission into every aspect of the Internet. As you may have heard, the Commission pursued an ends-justify-the-means approach to subject broadband providers to a new Title II regime without a shred of evidence that it is even necessary, solely to check the boxes on a partisan agenda. Even worse, the Order punts authority to FCC staff to review current and future Internet practices under vague standards, such as "just and reasonable," "unreasonable interference or disadvantage" (*i.e.,* the infamous general conduct standard), and "reasonable network management." This is a recipe for uncertainty for our Nation's broadband providers and, ultimately, edge providers. Additionally, the Commission has gone down a path of no return by allowing this Administration to have undue influence over its decisions, which undermines confidence in our ability to produce fair, unbiased and reasoned outcomes. Other countries follow the actions of the FCC, and this decision is likely to sway the positions of our international regulatory counterparts in international fora.

Nonetheless, I continue to suggest creative ideas to modernize the regulatory environment to reflect the current marketplace, often through my public blog. I have written extensively on the need to reform numerous outdated and inappropriate Commission procedures. For instance, I have advocated that any document to be considered at an Open Meeting should be made publicly available on the Commission's website at the same time it is circulated to the Commissioners, typically three weeks in advance. This fix is not tied to the net neutrality item, although I think it provides a great example of why change is needed.

Under the current process, I meet with numerous outside parties prior to an Open Meeting, but I am precluded from telling them, for example, having read the document, that their concern is misguided or already addressed. I can't tell them anything of value. This can be a huge waste of time and effort for everyone involved, and allows some favored parties an unfair advantage in the hunt for scarce and highly prized information nuggets. Ultimately, it prevents the staff from focusing on the real issues and improving the text of an item. The only solution, in my eyes, is greater transparency by the Commission, and I have suggested a way to accomplish this consistent with current law. The stated objections to this approach, presented under the cloak of procedural law, are really grounded in resistance to change and concerns about resource management.

In addition, the Commission has a questionable post-adoption process that deserves significant attention. In particular, items approved at a Commission meeting can then be changed by the Commission staff after the meeting to make or strengthen arguments in response to Commissioner dissents or additional industry filings to improve the Commission's potential litigation position.

While I generally refrain from commenting on legislation, I appreciate the ideas put forth by Senators Heller and others, which would address these and other Commission practices, such as the abuse of delegation, that lock the public out of the critical end stages of the deliberative process. I believe that these proposed changes, as well as others, would improve the functionality of the Commission and improve consumer access to information.

Separately, I have also been outspoken on many substantive issues, such as the need to free up spectrum resources for wireless broadband, both licensed and unlicensed. I was pleased to work with my colleague, Commissioner Rosenworcel, and share our thoughts on how to expand opportunities for unlicensed spectrum, especially in the upper 5 GHz band. I applaud Senators Rubio and Booker for their continued leadership on looking for ways to increase access to this band for Wi-Fi use. Additionally, I have put forward substantive suggestions for the Lifeline program. I recognize that several of my colleagues are interested in expanding the program to include broadband, and I have put forth ideas on how to ensure that any expansion fits within a reasoned budget and does not result in new waste, fraud, and abuse. I look forward to working with my colleagues on this and other issues in the coming months.

I stand ready to answer any questions you may have.

The CHAIRMAN. Thank you, Commissioner O'Rielly.

Commissioner Pai.

STATEMENT OF HON. AJIT PAI, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Mr. PAI. Chairman Thune, Ranking Member Nelson, and Members of the Committee, thank you for giving me the opportunity to testify this afternoon. It has been an honor to work with the Members of this Committee on a wide variety of issues, from promoting rural broadband deployment to freeing up more spectrum for mobile broadband. It is a particular privilege to appear before you today now that Senator Moran, from my home state of Kansas, has joined the Committee.

When this kind Committee held my confirmation hearing, Senator Moran was kind enough to introduce me, and I can only hope that his kindness will continue if and when he has a chance to question me later today.

[Laughter.]

Mr. PAI. I last testified in front of this Committee on March 12, 2013. And since then, things have changed dramatically at the FCC. I wish that I could say that, on balance, these changes have been for the better. But, unfortunately, that is not the case.

The foremost example, of course, is the Commission's decision last month to apply Title II to the Internet. The Internet is not broken. The FCC didn't need to fix it, but our party line vote overturned a 20-year bipartisan consensus in favor of a free and open Internet. With the Title II decision, the FCC voted to give itself the power to micromanage virtually every aspect of how the Internet works. The FCC's decision will hurt consumers by increasing their broadband bills and reducing competition. And the Title II order was not the result of a transparent rulemaking process.

The FCC has already lost in court twice and its latest order has glaring legal flaws that are sure to keep the FCC mired in litigation for a long time.

Turning to the Designated Entity Program, the FCC must take immediate action to end its abuse. What once was a will-intentioned program designed to help small businesses, has become a playpen for corporate giants. The reason AWS–3 auction is a shocking case in point.

DISH, which has annual revenues of $14 billion and a market cap of over $34 billion, holds an 85 percent equity stake in two companies that are now claiming $3.3 billion in taxpayer subsidies. That makes a mockery of the small business program. The $3.3 billion at stake is real money. It could be used to underwrite over 580,000 Pell Grants, fund school lunches for over 6 million children, or incentivize the hiring of over 138,000 veterans for a decade.

The abuse also had an enormous impact on small businesses from Nebraska to Vermont. It denied them spectrum licenses they would have used to give rural consumers a competitive wireless alternative.

In my view, the FCC should quickly adopt a further notice of proposed rulemaking so that we can close loopholes in our rules before the next spectrum auction.

Chairman Thune, Ranking Member Nelson, and Members of the Committee, thank you, once again, for giving me this opportunity to testify. I look forward to answering your questions and to working with you and your staff in the time to come.

[The prepared statement of Mr. Pai follows:]

PREPARED STATEMENT OF HON. AJIT PAI, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Chairman Thune, Ranking Member Nelson, and Members of the Committee, thank you for giving me the opportunity to testify this afternoon. Over the last two-and-a-half years, it has been an honor to work with the Members of this Committee on a wide variety of issues, from encouraging broadband deployment in rural America to eliminating the sports blackout rule, from making available more spectrum for mobile broadband to better connecting our Nation's schoolchildren with digital opportunities.

And it is a particular privilege to appear before you today now that Senator Moran of my home state of Kansas has joined the Committee. When this Committee held my confirmation hearing, Senator Moran was kind enough to introduce me, and I have since enjoyed appearing with him at events back in Kansas. I hope that his kindness will continue when he has the opportunity to question me later.

I last testified in front of this Committee two years ago. Since that hearing on March 12, 2013, things have changed dramatically at the FCC. I wish I could say that these changes, on balance, have been for the better. But unfortunately, that is not the case.

Net Neutrality.—The foremost example, of course, is the Commission's decision last month to apply Title II to the Internet. That party-line vote overturned a 20-year bipartisan consensus in favor of a free and open Internet. It was a consensus that a Republican Congress and a Democratic President enshrined in the Telecommunications Act of 1996 with the principle that the Internet should be a "vibrant and competitive free market . . . unfettered by Federal or State regulation." It was a consensus that every FCC Chairman—Republican and Democrat—had dutifully implemented for almost twenty years. And it was a consensus that led to a thriving, competitive Internet economy and more than a trillion dollars of investment in the broadband Internet marketplace—investments that have given Americans better access to faster Internet than our European allies, and mobile broadband speeds that are the envy of the world.

Here is the truth. The Internet is the greatest example of free-market innovation in history. The Internet empowers Americans to speak, to post, to rally, to learn, to listen, to watch, and to connect in ways our forefathers never could have imagined. The Internet is a powerful force for freedom, at home and abroad.

In short, the Internet is not broken. And it didn't need the FCC to fix it.

But last month, the FCC decided to try to fix it anyway. It reclassified broadband Internet access service as a Title II telecommunications service. It seized unilateral authority to regulate Internet conduct, to direct where Internet service providers put their investments, and to determine what service plans will be available to the American public. This was a radical departure from the bipartisan, market-oriented policies that have served us so well for the last two decades.

With the Title II decision, the FCC voted to give itself the power to micromanage virtually every aspect of how the Internet works. The FCC can now regulate broadband Internet rates and outlaw pro-consumer service plans. As the Electronic Frontier Foundation wrote us, the FCC has given itself "an awful lot of discretion, potentially giving an unfair advantage to parties with insider influence," which is "hardly the narrow, light-touch approach we need to protect the open Internet." Or as EFF's cofounder wrote after the decision, "Title II is for setting up monopolies, not tearing them apart. We need competition, not regulation. We need engineers not lawyers."

And that's precisely the problem. When I talk to people outside the Beltway, what they want—what they need—isn't more regulation but instead more broadband deployment and more competition. But this "solution" takes us in precisely the opposite direction. It will result in less competition and a slower lane for all. What have our Nation's scrappiest Internet service providers told us? What did we hear from 142 wireless ISPs who've deployed broadband service using unlicensed spectrum without a dime from the taxpayer? What did we hear from 24 of the Nation's smallest ISPs, each with fewer than 1,000 residential customers? What did we hear from 43 municipal broadband providers, including Cedar Falls Utilities? What did we

hear from the National Black Chamber of Commerce, the National Gay & Lesbian Chamber of Commerce, the U.S. Hispanic Chamber of Commerce, and the U.S. Pan Asian American Chamber of Commerce? That regulating the Internet under Title II is sure to reduce competition and drive smaller competitors out of the business. Monopoly rules from a monopoly era will move us toward a monopoly.

The FCC's Title II decision is a raw deal for consumers. Broadband bills will go up—the plan explicitly opens the door to billions of dollars in new taxes on broadband. One estimate puts the total at $11 billion a year—with $4 billion a year on top of that if the Internet Tax Freedom Act isn't extended (or better yet made permanent). And broadband speeds will be slower. The higher costs and regulatory uncertainty of utility-style regulation have stymied Europe's broadband deployment, and America will follow suit. Just look at the data. Today, 82 percent of Americans, and 48 percent of rural Americans, have access to 25 Mbps broadband speeds. In Europe, those figures are only 54 percent and 12 percent respectively. In the U.S., average mobile broadband speeds are 30 percent faster than they are in Western Europe. And broadband providers in the U.S. are investing more than twice as much per person and per household as their European counterparts. Their model has not succeeded, as even leading European regulators and legislators concede. Indeed, neither big nor small providers will bring rural and low-income Americans online if it's economically irrational for them to do so. In short, Title II's utility-style regulation will simply broaden the digital divide.

I am hopeful that the FCC won't get the chance. The FCC has already gone to court twice with attempts to regulate the Internet. Both times, the courts have rejected the agency's efforts. And I doubt the third time will be the charm. As detailed in my written dissent, the Title II order has glaring legal flaws that are sure to keep the Commission mired in litigation for a long, long time.

Finally, the Title II order was not the result of a transparent notice-and-comment rulemaking process. For one thing, the FCC didn't actually propose Title II. In the May 2014 *Notice of Proposed Rulemaking,* the agency's plan was quite different; it was premised on section 706 of the Telecommunications Act and the *Verizon* court's admonitions on how to avoid Title II. Only in early February did the public learn that the FCC would pursue this course. And even then, the FCC did not make the plan public (despite the fact that an overwhelming majority of Americans—79 percent—said they wanted to see it). Nor did it make public the critical last-minute changes to the *Order* that were sought by a particular company and special interest group. Only two weeks after the FCC voted on the *Order* were Americans *finally* allowed to see it. Whatever the normal practice at the agency, net neutrality was anything but normal. We should have published the plan before we voted on it and given the public a chance to comment on its many novel details. Going forward, I join Commissioner O'Rielly's call for the FCC to make public three weeks beforehand the matters scheduled for a vote at public meetings.

The Designated Entity Program.—The FCC must take immediate action to end abuse of our designated entity program. What was once a well-intentioned program designed to help small businesses has become a playpen for corporate giants.

Here's how the program was supposed to work. When Congress first granted the FCC auction authority in 1993, its goal was to help small businesses—"designated entities" in FCC parlance—compete for spectrum licenses with large, established companies. A small business that lacked the funding to outspend a large corporation could bid, say, $100,000 for a license but end up paying only $75,000. In effect, a Federal subsidy would cover the remaining $25,000.

Perversely, this well-intentioned program now helps Goliath at David's expense. Small business discounts are now being used to give billions of dollars in taxpayer-funded subsidies to Fortune 500 companies and to make it harder for legitimate small businesses to compete in the wireless market. Bipartisan concern about this state of affairs has emerged from this Committee. And a chorus is growing among the public as well. For instance, both the Communications Workers of America and the NAACP made this point recently, explaining that big businesses are now abusing the program and driving out legitimate small and minority-owned businesses.

The FCC's recent AWS–3 spectrum auction is a shocking case in point. Last month, the FCC disclosed that two companies, each of which claimed it was a "very small business" with less than $15 million in revenues, together won over $13 *billion* in spectrum licenses and are now claiming over $3 billion in taxpayer-funded discounts. How could this be? DISH Network Corp. has an 85 percent ownership stake in each (not to mention highly intricate contractual controls over each). Allowing DISH, which has annual revenues of approximately $14 billion and a market capitalization of over $32 billion, to obtain over $3 billion in taxpayer-funded discounts makes a mockery of the small business program. Indeed, DISH has now disclosed that it made approximately $8.504 billion in loans and $1.274 billion in eq-

uity contributions to those two companies—hardly a sign that they were small businesses that lacked access to deep pockets.

DISH's abuse of the program during the AWS–3 auction had an enormous impact on small businesses. Here are just a few examples:

- Glenwood Telephone Membership Corp. provides communications services to rural parts of Nebraska. Glenwood was the provisionally winning bidder for two licenses that would have allowed it to serve parts of Nebraska, but it was outbid by a DISH entity claiming a taxpayer subsidy. As a result, it did not win a single license in the auction. Glenwood has gross annual revenues of just over $13 million, which are *1,052 times less than DISH's.*
- Rainbow Telecommunications Association, Inc. provides communications services to rural parts of Kansas. Rainbow was the provisionally winning bidder for one license that would have allowed it to serve parts of Kansas, but it was outbid by a DISH entity claiming a taxpayer subsidy. As a result, it did not win a single license in the auction. Rainbow has gross annual revenues under $14 million, which are *1,025 times less than DISH's.*
- Pioneer Telephone Cooperative, Inc. provides communications services in rural parts of Oklahoma. Although Pioneer won three licenses in Oklahoma and Kansas, it was outbid by a DISH entity claiming a taxpayer subsidy for another license that it could have used to serve other parts of Oklahoma. Pioneer has gross annual revenues under $15 million, which are *933 times less than DISH's.*
- Geneseo Communications Services, Inc. provides communications services to rural parts of Illinois. Although Geneseo won two licenses in Illinois, it was outbid by DISH entities claiming taxpayer subsidies for four other licenses that Geneseo could have used to serve different parts of Illinois. Geneseo has annual gross revenues under $16 million, which are *894 times less than DISH's.*
- VTel Wireless, Inc. provides communications services to consumers in rural parts of Vermont. VTel was the provisionally winning bidder for one license that would have allowed it to serve parts of Vermont, but it was outbid by a DISH entity claiming a taxpayer subsidy. As a result, it did not win a single license in the auction. VTel has gross annual revenues under $27 million, which are *515 times less than DISH's.*

In every one of these cases, the small businesses that the DISH entities outbid either claimed no taxpayer-funded discounts or ones that were far smaller than those claimed by DISH.

These examples are just a small part of a much broader story. Analysis shows that there were over 440 licenses in the auction for which the DISH entities outbid smaller companies or ones that were not providers of nationwide service that had been winning the licenses. That's more than three times as often as those providers were outbid by AT&T, Verizon, and T-Mobile *combined.*

I am appalled that a corporate giant which itself does not have a single wireless customer has attempted to use small business discounts to box out the very companies that Congress intended the program to benefit and to rip off American taxpayers to the tune of more than $3 billion. And I am certainly not alone in feeling this way. The Communications Workers of America, the NAACP, and many others have already called on the FCC to reject DISH's attempt to claim these discounts.

This $3.3 billion is money that otherwise would have been deposited into the U.S. Treasury. This is money that could be used to fund 581,475 Pell Grants, pay for the school lunches of 6,317,512 children for an entire school year, or extend tax credits for the hiring of 138,827 veterans for the next 10 years. This is real money.

And it is certainly not too late to ensure that the Treasury gets it. The DISH entities' applications are pending before the FCC. If it turns out that DISH did not comply with the FCC's rules, the agency must, at a minimum, deny them these discounts. The American people deserve no less.

But regardless of whether DISH violated our rules, the FCC must take immediate action to ensure that this abuse never happens again. DISH is certainly not the only entity that has attempted to game the system. Remarkably, the Commission is currently moving in the wrong direction. Instead of tightening our rules to prevent Fortune 500 companies from abusing the designated entity program, the FCC adopted a Notice of Proposed Rulemaking (NPRM) in October 2014 that would actually *loosen* our rules and make it easier for large companies to benefit from the program. I dissented from those parts of the NPRM. Unfortunately, the Commission's adoption of those proposals as well as an arbitrage-enabling waiver it granted on a party-line vote prior to the AWS–3 auction sent precisely the wrong signal to large companies. Instead of strictly enforcing our rules to protect American taxpayers and

small businesses, the FCC sent an "anything goes" message to those inclined to game the system.

The FCC must reverse course. To start, it should quickly adopt a Further Notice of Proposed Rulemaking that would allow the agency to consider a full range of options before our next auction to close loopholes in our rules. The proposals teed up in the October NPRM simply do not give the Commission that degree of flexibility. And, as I am well aware from my experience in the Office of General Counsel, the Commission has lost on notice grounds before when trying to change our designated entity rules.

If, in the face of recent experience, the FCC is not willing to crack down on abuse of the designated entity program, then Congress must act.

In that vein, I applaud the bipartisan leadership of Senators Ayotte and McCaskill on this issue and stand ready to work with this Committee to ensure that the designated entity program benefits legitimate small businesses rather than large corporate interests.

Process.—I firmly believe that the FCC is at its best when it acts in a bipartisan, collaborative manner. Commissioners will inevitably hold different viewpoints on important issues. But traditionally, there has been a willingness to compromise, to negotiate in good faith, and to reach consensus. I witnessed this firsthand during my years as an agency staffer. And I directly participated in such negotiations and compromises during the first year-and-a-half of my tenure as a Commissioner.

For example, during my service as a Commissioner under Chairman Genachowski and Chairwoman Clyburn, 89 percent of votes on FCC meeting items were unanimous. We didn't always start out in the same place. But we worked hard to reach agreements that everyone could live with and we usually succeeded. We understood that no political party has a monopoly on wisdom, and we recognized that communications issues historically have not been partisan in nature.

Unfortunately, the environment at the Commission is now much different. Since November 2013, only 50 percent of votes at FCC meetings have been unanimous. This level of discord is unprecedented. Indeed, *there have been 40 percent more party-line votes at FCC meetings in the last seventeen months than there were under Chairmen Martin, Copps, Genachowski, and Clyburn combined.*

On issue after issue, the Commission's Republicans have been willing to compromise. But time and time again, our overtures have been rebuffed. Last December, for instance, I offered twelve proposed edits to the Incentive Auction Procedures Public Notice. I did not expect that all of them would be accepted. And indeed, even if all of them had been accepted, the document certainly would not have been what I would have drafted if my office had the pen. But I was willing to meet the Chairman's Office more than halfway.

So what happened? Eleven of my suggestions were rejected outright, and the response was "maybe" on the twelfth. For each proposal but one, there was no willingness to talk, no willingness to negotiate, no willingness to compromise. It was just one red line after another, or so I was told. What were some of those proposals that were viewed as too extreme? One was my suggestion to extend the comment deadlines for these exceedingly complex procedures. But I was told that we could not do so without risking a delay in the auction. You might say I was a little amused when the FCC later ended up extending the deadlines *twice* after receiving complaints from stakeholders. Then again, this wasn't the first time that an idea offered by a Republican Commissioner has been rejected only to be accepted when proposed by someone else. Last summer for instance, the Chairman's Office rejected some of my proposed changes to the E-Rate order (including such "radical" proposals as allowing schools and libraries to use E-Rate funds for caching servers) only to accept them when they were offered by one of the Democratic Commissioners.

This isn't how the FCC used to operate. And it's certainly not how it should function. Our work product is far better when every member of the Commission is allowed to contribute. And our orders have far more legitimacy when they are the product of consensus rather than raw political power.

The divisive manner in which the Commission is being run extends to other areas as well. In particular, the Commission's longstanding procedures and norms have repeatedly been abused in order to freeze out Commissioners and subvert the deliberative process. Here are just three examples:

- In a dispute about whether third parties should be given access to sensitive programming contracts in the Comcast-Time Warner Cable and AT&T/DIRECTV merger proceedings, the Chairman's Office circulated an order at 1:39 PM on November 10, 2014 (the afternoon before Veterans Day) and told Commissioners that they had to cast their votes by the end of that day or else the programming contracts would be released. What was the emergency requiring hurried consid-

eration of such an important and complex issue? There was none. Given this process, I wasn't surprised that the D.C. Circuit later stayed the disclosure order the Commission adopted on a party-line vote.

- The Chairman's Office circulated an item last July that, among other things, changed the coordination zones previously adopted by the Commission in the AWS–3 band. When I asked the Wireless Telecommunications Bureau to show me what the new coordination zones would be, the Bureau said that it could not do so. After I indicated that I would be unable to cast a vote on new coordination zones without knowing what those zones were, the Chairman's Office pulled the item from circulation and directed the Bureau to issue it on delegated authority.
- It has long been customary at the FCC for Bureaus planning to issue significant orders on delegated authority to provide those items to Commissioners 48 hours prior to their scheduled release. Then, if any one Commissioner asked for the Order to be brought up to the Commission level for a vote, that request would be honored. I can tell you from my time as a staffer in the Office of General Counsel that we consistently advised Bureaus about this practice. Recently, however, the Chairman's Office has refused to let the Commission vote on items where *two* Commissioners have made such a request. Moreover, on many occasions significant matters have not even been provided to the Commission 48 hours prior to their release. Often, we only receive them a couple of hours in advance. Other times, we learn about them from the press after they are released.

Given these abuses as well as others, I commend this Committee and the House Energy and Commerce Committee for addressing the issue of FCC process reform. In particular, I would urge you to consider taking steps to ensure that important policy decisions are made by the Commission as a whole rather than staff acting at the direction of the Chairman's Office. Congress established the FCC as a multi-member agency and gave each of its five members an equal vote. Had Congress wanted to make the agency a sole proprietorship or to make some Commissioners more equal than others, it would have structured the Commission in a dramatically different way. I believe that action should be taken to restore the FCC to its collaborative and bipartisan tradition.

Chairman Thune, Ranking Member Nelson, and Members of the Committee, thank you once again for holding this hearing and allowing me the opportunity to speak. I look forward to answering your questions, listening to your views, and continuing to work with you and your staff in the days ahead.

The CHAIRMAN. Thank you, Commissioner Pai.

Commissioner Rosenworcel.

STATEMENT OF HON. JESSICA ROSENWORCEL, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Ms. ROSENWORCEL. Good afternoon, Chairman Thune and Ranking Member Nelson and Members of the Committee.

Today, communications technologies account for one-sixth of the economy. And, they are changing at a breathtaking pace. How quickly? Well, consider this: it took the telephone 75 years before it reached 50 million users. To reach the same number of users, television took 13 years and the Internet took 4 years. More recently, Angry Birds took only 35 days.

[Laughter.]

Ms. ROSENWORCEL. So we know the future is coming at us faster than ever before, and we also know that the future involves the Internet. And our Internet economy is the envy of the world. It was built on a foundation of openness, and that is why I support network neutrality.

Now, with an eye to the future, I want to talk about two other things today: Wi-Fi and the Homework Gap. First, Wi-Fi. Few of us go anywhere now without our mobile devices in our palms, pockets, or purses. That's because every day in countless ways our lives

are dependent on wireless connectivity. While the demand for our airwaves grows, the bulk of our policy conversations are about increasing the supply of licensed airwaves for available for commercial auction. This is good but it is also time to give unlicensed spectrum and Wi-Fi its due.

We should do that because Wi-Fi is, after all, how we get online. Wi-Fi is also how our wireless carriers manage their networks with licensed spectrum through offloading. And Wi-Fi is a boon to the economy. There are studies that demonstrate that it is responsible for more than $140 billion of economic activity every year. And that's big.

So we need to make unlicensed services like Wi-Fi a priority. And the Commission is doing just that with our work on the 3.5 gigahertz band, and next year with our work on the 600 megahertz band. But, I think, it's going to take more than this to keep up with demand and that's why I think the time is right to explore greater unlicensed use in the upper portion of the 5 gigahertz band. And, going forward, we all need to be on guard to find more places for Wi-Fi to flourish.

Now, second. I want to talk about the Homework Gap. Today, roughly seven in ten teachers assign homework that requires broadband access. But FCC data suggests that as many as one in three households do not have access to broadband at any speed. So think about those numbers. Where they overlap is what I call the Homework Gap. Because, if you are a student in a household without broadband today, getting your homework done, just getting your homework done, is hard and it's why the Homework Gap is now the cruelest part of our digital divide. But it's within our power to bridge it.

More Wi-Fi will help, as will our recent efforts to upgrade connectivity in our Nation's libraries through E-Rate. But more work remains. And I think the FCC needs to take a hard look at modernizing its program to support connectivity in low-income households, especially those with school-aged children. And I think the sooner we act the sooner we bridge this gap and give more students a fair shot at digital age success.

Thank you.

[The prepared statement of Ms. Rosenworcel follows:]

PREPARED STATEMENT OF HON. JESSICA ROSENWORCEL, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Good afternoon, Chairman Thune, Ranking Member Nelson, and members of the Committee. Thank you for the opportunity to appear before you in the company of my colleagues at the Federal Communications Commission.

Today, communications technologies account for one-sixth of the economy—and they are changing at a breathtaking pace. How fast? Consider this: According to the *Wall Street Journal,* it took the telephone 75 years before it reached 50 million users. To reach the same number of users, television took 13 years, and the Internet 4 years. But Angry Birds took only 35 days.

So we know the future is coming at us quicker than ever before. We also know that the future involves the Internet and that our Internet economy is the envy of the world. It was built on a foundation of openness. Sustaining the openness that has made us innovative, fierce, and creative is vitally important. In fact, our commercial and civic success in the digital age depends on it. That is why open Internet policies matter—and why I support network neutrality.

As you have undoubtedly heard, four million Americans wrote the FCC to make known their ideas, thoughts, and deeply-held opinions about Internet openness.

They lit up our phone lines, clogged our e-mail in-boxes, and jammed our online comment system. That might be messy, but whatever our disagreements on network neutrality, I hope we can agree that's democracy in action and something we can all support.

With an eye to the future, I want to talk about two other things today—the need for more Wi-Fi and the need to bridge the Homework Gap.

First, up Wi-Fi. Few of us go anywhere now without mobile devices in our palms, pockets, or purses. That is because every day, in countless ways, our lives are dependent on wireless connectivity. While the demand for our airwaves grows, the bulk of our policy conversations are about increasing the supply of licensed airwaves available for auction. This is good. But the best spectrum policy involves a mix of both licensed and unlicensed airwaves. And focus on the former should not come at the expense of the latter.

That's because the 2.4 GHz band where Wi-Fi makes its primary home is getting mighty crowded. The demand for 5 GHz Wi-Fi is also growing. So before we overwhelm Wi-Fi as we know it, we need more efforts to secure more unlicensed spectrum.

There are no shortage of reasons why this is a good idea.

After all, Wi-Fi is how we get online—in public and at home.

Wi-Fi is also how our wireless carriers manage their networks. In fact, today nearly one-half of all wireless data connections are offloaded onto unlicensed spectrum.

Wi-Fi is how we foster innovation. That's because the low barriers to entry for unlicensed airwaves make them perfect sandboxes for experimentation.

Wi-Fi is also a boon to the economy. The economic impact of unlicensed spectrum has been estimated at more than $140 billion annually.

So we need to make unlicensed services like Wi-Fi a priority in our spectrum policy. We have opportunities to do just that with upcoming FCC work in the 3.5 GHz band and in the guard bands in our reimagined 600 MHz band. But it will take more than this to keep up with demand. That is why I think the time is right to explore greater unlicensed use in the upper portion of the 5 GHz band, and specifically from 5850 to 5925 MHz. In the future, we need to be on guard for more opportunities like this so we can find more places for Wi-Fi to flourish.

Second, I want to talk about another issue that matters for the future—the Homework Gap. Today, roughly seven in ten teachers assign homework that requires access to broadband. But FCC data suggest that as many as one in three households do not subscribe to broadband service at any speed—due to lack of affordability and lack of interest.

Think about those numbers. Where they overlap is what I call the Homework Gap. If you are a student in a household without broadband, just getting homework done is hard. Applying for a scholarship is challenging. While some students may have access to a smartphone, let me submit to you that a phone is just not how you want to research and type a paper, apply for jobs, or further your education.

These students enter the job market with a serious handicap. That's a job market today where half of all jobs require digital skills. By the end of the decade that number jumps to 77 percent. But the loss is here more than individual. It's a loss to our collective human capital and shared economic future that we need to address.

That is why the Homework Gap is the cruelest part of our digital divide. But it is within our power to bridge it. More Wi-Fi will help, as will our recent efforts to upgrade connectivity in libraries through the E-Rate program. But more work remains. I think the FCC needs to take a hard look at modernizing its program to support connectivity in low-income households, especially those with school-aged children. And I think the sooner we act the sooner we bridge this gap and give more students a fair shot at 21st century success.

Thank you and I look forward to answering any questions you might have.

The CHAIRMAN. Thank you, Commissioner Rosenworcel.

We have a lot of participation on both sides today. And so, as much as we can, try to adhere to the 5 minute rule. I know it will be hard as we have a lot of interest in this subject and a lot of questions we'd like to ask our panelists today.

So let me start by talking a little bit about an issue that's important to me and to my state, and I'll start by saying that laws and policies that are outdated often lead to rules that are arbitrary which ultimately limits consumer choice and raises cost. And the

current Universal Service Fund rules require a rural consumer to buy voice service from a small rural telephone company in order for that carrier to be eligible for USF support. If the same rural consumer decides to buy only broadband services without a telephone subscription, the carrier is no longer eligible to receive USF support for that subscriber's line. This contradiction undermines the mission of the new broadband-centric USF. It makes broadband more expensive for rural households and increasingly threatens the sustainability of rural communications networks.

Last year, Senators Gardner, Klobuchar, and I led letters to the Commission that urged the FCC to propose rules to solve this issue. Nearly a year later, that issue remains unsolved. And so, I want to ask each of you a question. I'm going to take the approach of my predecessor, Chairman Rockefeller, and ask for the commitment from each commissioner. And the question, very simply, is: Will you commit to solving this growing threat to rural communications by the end of this year?

Mr. WHEELER. Aye.

Ms. CLYBURN. Absolutely.

Mr. O'RIELLY. Yes.

Mr. PAI. Yes.

Ms. ROSENWORCEL. Yes.

The CHAIRMAN. Very good. Thank you.

Mr. WHEELER. OK, we have unanimity now, sir.

[Laughter.]

The CHAIRMAN. Yes. This was designed to get you guys all on the same side of an issue.

[Laughter.]

The CHAIRMAN. I want to make an observation too. I know with the Commission's order is the subject of the day in addition to other things that we would like to talk about.

I have a father who is 95 years old. He lives in my hometown of Murdo, South Dakota with a population of about 500 people. He's a user of the Internet. And it strikes me if I had to suggest to my dad that we're going to regulate the Internet that he uses with a law that was passed during the Great Depression when he was 14 years old, I think he would probably be flabbergasted. And essentially, that's what we're doing. We're trying to take something that was designed for a very different era and squeeze it and trying to fit it into a modern technology. And one of the issues that that statute allows for is rate regulation.

Now, I know that, Chairman, you have contended that no rate regulation is going to result from the open-net Internet order. Let's just say, hypothetically, that someone files a complaint at the FCC alleging that the rates that they're paying an Internet Service Provider for broadband service are not just and reasonable under Section 201?

And I'll also say to Commissioner Pai, as a result of Title II reclassification, isn't the Commission legally obligated to investigate and rule on that type of a complaint?

Mr. PAI. Mr. Chairman, that is absolutely right. The Order opens the door to complaints under Section 208, both to the Commission and to courts around the country. And at that point it will be up to the Commission, if it receives such a complaint, to adjudicate

whether or not a rate is just and reasonable. And most notable, the Order limits itself only to saying that we don't engage in *ex ante* regulation, things like tariffs and its play in methodology. But it says nothing about ex post regulation, and I think that is why ex post rate regulation is a very real prospect.

The CHAIRMAN. So if that circumstance were to happen, Commissioner Rosenworcel, if the Commission judges the rates to be unreasonable, could the FCC require the ISP to adjust its rates or to impose fines and forfeitures on the ISP?

Ms. ROSENWORCEL. Well, we don't have such a case before us right now, but I think it's important as a matter of due process that any provider that's having difficulty succeeding in getting the interconnection they need to provide service has the opportunity to complain to the Commission and seek resolution.

The CHAIRMAN. So the answer is, yes, the FCC could.

Ms. ROSENWORCEL. We'll see when we have a complaint before us.

The CHAIRMAN. Right. But I'm just saying——

Ms. ROSENWORCEL. Sure.

The CHAIRMAN. I'm not saying you should. I'm saying you could.

Commissioner Clyburn, in a rate complaint case, how will with the FCC decide if a rate is unreasonable or unjust?

Ms. CLYBURN. So given the same context that you set up, one of the examples that I gave in my opening statement was on inmate calling. And that affirms and should affirm to us all that the bar is incredibly high when it comes to the scenario that you put forth. We waited over 10 years to even think about addressing what was obviously a market failure. So again, we won't know, like my colleague said, until something is before us. But it passed as prologue that bar is extremely high for that case to come to the resolution in which you put forth.

The CHAIRMAN. But you would have the discretion to determine if a rate is unjust or unreasonable?

Ms. CLYBURN. We have an obligation, I believe, to look at any complaint, anything filed before us, and make a decision accordingly.

The CHAIRMAN. And if that decision is made, if that conclusion is reached, the FCC could, in that circumstance, act in a way that would adjust rates or impose fines?

Ms. CLYBURN. I jokingly say that, even though I am from the south and we have the other south, South Carolina, and that we have been known—and there have been very interesting people who have predicted the future—I, unfortunately, do not have that talent.

The CHAIRMAN. Well I would have a hard time, I would think, explaining—or how that adjudicatory process would not be rate regulation and, you know like I said, granted the Chairman has said, that is something on which they would forebear. But if a case is brought forward, it strikes me at least, that the FCC has an obligation to respond. And I also think that things that are decided by this Commission certainly don't bind future commissions, which is why we've argues all along that working constructively on a legislative solution that sets clear rules-of-the-road is the best approach to doing this.

But that being said, my time has expired.

Senator Nelson.

Senator NELSON. Chairman Wheeler, rate regulation, unbundling, tariffing, these are things that some of the big corporations are quite concerned about and no doubt you've had conversations with the CEOs of those corporations. And you've explained what your order is. How did you explain it and what was their reaction?

Mr. WHEELER. Thank you, Senator.

So rate regulation, tariffing, unbundling, those sections are all forborne, I never know what the past tense is on forbearance but it's we are not using them out of Title II.

To the point that Senator Thune was just making: 1993, Senator Markey, then-Congressman Markey, created Section 332 of the Communications Act in the House, which was sought by the wireless industry when they asked to be treated as Title II common carriers and to have forbearance from parts of the act that are no longer appropriate in a non-monopoly situation. That included, specifically as a decision by Congress, Section 201. So the kind of example that was just raised about Section 201(b) being some kind of backdoor into rate regulation has existed for 22 years in the wireless industry. And the Commission has not been confronted and has not acted in this kind of way that suggested it's some kind of backdoor regulation.

In fact, what has happened is that with the absence of consumer rate regulation, that industry has been incredibly successful. The wireless voice industry has had $300 billion in investment since then and it was that model that is actually more forbearance than was created for the wireless industry that we patterned the open Internet order on so that it is not your grandfather's Title II. Title II has 48 sections. Twenty-seven of those sections we said we will not use, which is 50 percent more than Mr. Markey results in 22 years ago.

So I think that the record is pretty clear. That if we say we're not going to have consumer rate regulation, we are not going to have tariffing, we are not going to have unbundling, and we explicitly remove those sections and say we're not looking at those sections and we pattern ourselves after something that has this kind of a two decade record of not having these imaginary horribles happen, then we're on a pretty course.

Senator NELSON. And things like transparency and a host of other issues, there's wide acceptance.

Mr. WHEELER. So the interesting thing is that there are four regulatory actions in our order; no blocking, no throttling, no paid prioritization in transparency, which are the same things that is the legislation up here that the Chairman and others have introduced contain those four. And the ISPs run ads saying, "Over all four of these, we would never think about doing these kinds of things."

Those are the four regulatory constructs. The thing where everybody gets agitated is that we also say, and there should be a basic set of ground rules for things that nobody can anticipate, that are not proscriptive regulatory saying, "We're smart, therefore you will do this." But we are saying, "Well, let's take a look and is that just

a reasonable? Is that in the consumer interest? Is that in the edge provider interest? Is that in the public interest?"

And, on a case-by-case basis. And the fascinating thing to me, sir, is that the ISPs for years have been saying, "We don't want the FCC to have such broad rulemaking authority. They ought to be looking at things like the FTC on a case-by-case basis."

And, now, what happens is we come out and we say "OK" we do something that is like the FTC on a case-by-case basis and everybody says, "Oh, that's terrible uncertainty. We don't know what it is. If only they would be making rules and telling us what things were?"

You can't have it both ways, but I think that what we have built is common on four aspects. The only four regulatory aspects, and then says, there needs to be a set of rules and there needs to be a set of standards, and there needs to be a referee on the field who can throw the flag if somebody violates those standards.

Senator NELSON. And I would just conclude, Mr. Chairman, by saying that certainly the five Commissioners in front of us would never do this kind of dastardly stuff. But, would a future Commission do it? And the flip side of that, and I'd like you to comment, Chairman Wheeler, what about the future CEOs that presently you have confidence in them, but what about someone that suddenly wants to go beyond the scope of your intent?

Mr. WHEELER. So CEOs come in to me, Senator, and they say, "You know, we trust you. We think you have, you know, we may not agree with everything but, you know, you're not wild and crazy. And we think that there'll be decent or responsible decisions. And so, we trust you but what about that crazy person that's going to follow you, you know, some years down the road?"

And my response is "I feel the same way about you, sir, that you have said, 'You would never do these kinds of dastardly things to the Internet, but what about the wild and crazy CEO who follows you?' "

And so, what all we are trying to do is say, "Let's have a basic set of rules." Is it just? Is it reasonable? And, is there a referee on the field who can measure against the yardstick and throw the flag if appropriate?

Senator NELSON. Thank you.

The CHAIRMAN. Thank you, Senator Nelson.

Senator Fischer.

STATEMENT OF HON. DEB FISCHER, U.S. SENATOR FROM NEBRASKA

Senator FISCHER. Thank you, Mr. Chairman and Ranking Member Nelson.

Chairman Wheeler, there are a number of Members of Congress who believe that new technologies can help the United States remain innovative, and I'm working with Senator Booker, Senator Schatz, Senator Ayotte, on the Internet of things. And I think that's going to be a very good bipartisan resolution and, moving forward, hopefully legislation so we can see that innovators are able to grow their businesses and they're going to be able to solve problems with clear rules and also clear expectations.

I think that's necessary; that innovators have to have that certainty out there. And when I look at the general conduct rule that is proposed that you have here, I'm concerned it could jeopardize that regulatory certainty that I think we have to have if we're going to remain competitive.

The Electronic Frontier Foundation has described this rule as an overreach and confusing. Specifically, the EFF said, "The FCC believes it has broad authority to pursue any number of practices; hardly the narrow, light-touch approach we need to protect the open Internet."

The Wall Street Journal reported that at a recent press conference you said, with respect to the general conduct rule, that "We don't really know. We don't know where things will go next."

The Order says the agency will "watch, learn, and act as required, a process that is sure to bring greater understanding to the Commission."

So my question to you is: how can any business that is trying to innovate have any kind of certainty that they're not going to be regulated by the FCC under, what I view, as a very vague rule that you have here?

For example, when will it be applied? What specific harms does the General Conduct rule seek to address that the rest of the President's Open Internet order doesn't capture? What are you after here?

Mr. WHEELER. Thank you, Senator.

First of all, I'd like to identify myself as an entrepreneur and as somebody who has started multiple companies and spent the ten years before I came into this job as a partner at a venture capital firm investing in those companies. And I know from my experience that the key to innovation is access and that, when gatekeepers deny access, innovation is stifled. That's what we want to avoid. We do not want to be in a situation where we are having proscriptive rules. We want to be, and what we have structured, is something that says, "OK, let's ask a couple of questions. What's the impact on consumers of this action? What's the impact on content providers, those who want to be delivering? And what's the public interest?"

And I think we can probably all agree that nobody wants to sit by and see something evil happen to any three of those legs of the stool. And those are the tests. And we look and say, "OK, now, what happens on those three legs of the stool with this kind of an action that we have a complaint on?" And the important thing is, as I was saying to Senator Nelson, that this is not us saying, "We're so smart, we know what you should do."

This is specifically doing what the ISPs have been saying to us. Don't make rules, but rather look at things on a case-by-case basis. And that's what we tried to build in that kind of flexibility.

Senator FISCHER. With that flexibility, though, what do you do with these entrepreneurs, the innovators that are coming up with things that I can't even imagine?

And there's a process that they're going to have to go through with the FCC that they don't know if they're going to be required to go through or not. What do you say to them?

Mr. WHEELER. Oh, I'm glad you asked.

Senator FISCHER. Do they wait and get their ideas hijacked?

Mr. WHEELER. No, we don't move up the stack. We are talking about the delivery services. We are not talking about regulating two guys and a dog in a garage and they have to get permission as to what they do.

Senator FISCHER. Do you think that's clear?

Mr. WHEELER. Yes, ma'am. Yes, ma'am. We are very clear on that and that is an essential component of this.

First of all, I think it's questionable what our reach would be in terms of statutory authority. We are dealing with the delivery of what these creative people want to do, and making sure that they have open delivery.

Senator FISCHER. And if I could just switch gears here. In your testimony, I read that you're trying to move forward with a voluntary incentive auction no later than early 2016.

Mr. WHEELER. Yes, ma'am.

Senator FISCHER. Are you committed to that?

Mr. WHEELER. Yes, ma'am.

Senator FISCHER. All right. Thank you.

The CHAIRMAN. Thank you, Senator Fischer.

Senator McCaskill.

STATEMENT OF HON. CLAIRE MCCASKILL,
U.S. SENATOR FROM MISSOURI

Senator MCCASKILL. Thank you.

I want to begin by associating myself with Commissioner Pai's remarks about designated entities, and we've visited about this.

The rest of the story that was not explained is that not only was this a very big company using small businesses to get a $3 billion advantage, a $3 billion advantage, one of the entities that was used was an Alaska-native corporation, which I think most people are aware, that they don't have any rules about being small. So it is insult to injury because Alaska-native corporations are multi-billion dollar, multi-national corporations that get special deals under our law. They don't have to compete. They don't ever age out of the program. They never get too old for the program. They never get too big for the program. And you confront legally. So this is really, I think, outrageous and I hope we can figure out a way to get to the bottom of it.

I want to talk about Lifeline a little bit. I have visited with many of you about Lifeline. I think it is a program that began under, I believe, President Reagan, President Bush, you know, it was a subsidy. It morphed into a program without any kind of controls, without any kind of regulation, and it was a mess. Now, I know we have had some enforcement but I know we've had a pilot program on expanding it to broadband.

Let me ask you first, Chairman Wheeler. When will the report on the pilot program be available?

Mr. WHEELER. Senator, I can't give you the specific date, but it's in the next couple of months.

Senator MCCASKILL. Well, we had some enforcement. There hasn't been much in a year. There is a list of reforms I think that include, and if any of you disagree with any of these reforms, if you would speak up for the record, I would appreciate it: Taking eligi-

bility determination out of the hands of carriers; competitive bidding; making sure consumers have some skin in the game; placing a cost cap on the program. Anybody disagree with those four reforms?

Mr. PAI. No.

Senator MCCASKILL. OK.

I would like to see those instituted and I would like a discussion from you about whether or not it makes sense to continue the Lifeline program. Doesn't it make more sense to make it a broadband program?

Looking at the Homework Gap, looking at the capability of making calls over the Internet, doesn't it make sense to institute these structural reforms as we transition this from a program where no one has skin in the game and we have allowed the carriers to commit massive fraud in this country? Doesn't it make sense to convert this whole program over to broadband? And I would love your take on that.

Ms. CLYBURN. I'm not sure who you're—but I'm going to speak up——

Senator MCCASKILL. Any of you can speak up. I would love somebody to speak up who disagrees with doing this.

Ms. CLYBURN. Well, I was showing my Southern graces. I cannot sit before you and say that I necessarily agree with everything you laid out.

One of the things that I am adamant about, I put forward five principles last year. One of which I think is the most important that would get to the heart of some of the problems that we are having is getting the companies out of the eligibility game. They should not be in that space. Grocery stores do not certify or have people eligible, you know, for SNAP. They're not in that game. Doctors do not qualify people for Medicaid. Providers should not qualify people for that program. This should be an independent arm. And I think, I truly believe, that a lot of the issues that have plagued this program, if we take them out of that, would go to the heart of what we are seeing.

Please.

Senator FISCHER. Commissioner Pai and Commissioner O'Rielly, I have had an opportunity to talk to the Chairman about this idea. Would you be willing to work with the Democratic Commissioners on a program that had controls and had reforms in it that transitioned over to a broadband program?

Mr. O'RIELLY. Absolutely. And, as you may know, I actually wrote recently about this issue and put forward some of my principles on reform. And I thought that it would be helpful to start in a review of the existing program and all the issues that it has faced before we go to the broadband—expand the program to broad band that hasn't seemed to be where the direction we've been getting the signals internally. So I've tried to put forward reforms that I would think that we could do going forward, but I think we should have that fundamental conversation on the reforms that should be in place before we go there.

Senator MCCASKILL. Or maybe there in lieu of.

Mr. O'RIELLY. I would be open to that as well.

Mr. PAI. Senator, first I want to thank you for your leadership on issues of FCC Fiscal Responsibility, including the AWS re-auction and Lifeline.

With respect to Lifeline as applied to broadband, I think it's critical for us, first, to learn the lessons from the pilot. Obviously, before expanding——

Senator MCCASKILL. Right.

Mr. PAI.—it to the entire broadband industry, we want to understand how the pilot has worked.

Second, I have put forward in a speech at the Citizens Against Government Waste a number of different principles for reform including some of the ones you've talked about. And I think it's critical for us to institute those first to ensure that the program is on a stable footing because, remember, the Lifeline program is the only one of the four Universal Service Fund programs that is not capped. And so, if we don't have those basic reforms for the process as the program stands, if we expand it to include broadband, there's no telling what kind of problems we might encounter.

Ms. ROSENWORCEL. Sure.

In 1985, when Ronald Reagan was in the White House, that's when we started this program. It was last updated during the Bush Administration. It is time to modernize this program along the lines you described, make sure it is free of any waste, fraud, and abuse, and then make it address broadband and things like we described, the Homework Gap.

Senator MCCASKILL. Right, great.

Mr. WHEELER. And this is not a question of how do we take what is there now and just do a paste here or a change there. We have to look at this entire program, soup to nuts, and say, "Wait a minute, this started in a twisted pair environment, metamorphosized into a mobile environment, we now live in a broadband environment. Why in the world are we sticking with the decisions of the past?"

Senator MCCASKILL. Great. Thank you all.

The CHAIRMAN. Thank you, Senator McCaskill.

Senator Heller, and try to keep it to five if you can.

STATEMENT OF HON. DEAN HELLER, U.S. SENATOR FROM NEVADA

Senator HELLER. Thank you, Mr. Chairman. Thanks for calling this hearing. I have a statement for the record that I'd like to submit.

The CHAIRMAN. Without objection.

[The prepared statement of Senator Heller follows:]

PREPARED STATEMENT OF HON. DEAN HELLER, U.S. SENATOR FROM NEVADA

Thank you, Mr. Chairman for holding this hearing today. Thank you, Chairman Wheeler and the Commissioners of the Federal Communications Commission. I appreciate you all being here today.

Many will take the time to discuss the merits of the *Open Internet Order* that was passed by a partisan vote last month. In short, I do not believe that the best method to handle the concerns of throttling, blocking and paid prioritization was by reclassifying the Internet under title II of the 1934 Communications Act.

While Chairman Wheeler has repeatedly said he will only use portions of that title and forbear others that are not needed, we all know that his word, doesn't matter. He will only be chairman for a limited amount of time. Another Chairman could

come along and do much more. A future FCC Chairman could install rate regulation for example. It really is only a matter of time in my opinion until another Chairman goes much further than this Chairman.

Unless of course, the rule is challenged in court and the FCC loses or bipartisan legislation can be passed to find a solution to the concerns that Internet Service Providers *could* block, throttle or create fast lanes for lawful content online. I still have hope that we can strike a bipartisan agreement and urge the Ranking Member to work with Chairman Thune and Republicans like me, to strike a deal that will remove all the economic uncertainty that the *Open Internet Order* has placed on the economy.

That being said, what I believe needs to be a focus on today's hearing is how the rule was passed. Aside from the negative impact on the economy, what this order did was shine a bright light on the process in which rules are enacted at the Federal Communications Commission.

For years, I have argued that the rulemaking process is outdated. My concerns are that the lack of transparency and collaboration combine for the ability of the majority at the Federal Communications Commission to use the process of creating a rule or amending an existing one to reach a desired conclusion. That is why I have introduced the FCC Process Reform Act during the last 112th, 113th and now in the 114th Congress.

The legislation would require the agency to publish rules and amendments before the Federal Communications Commission votes on them. We should never have to wait until a regulatory rule is passed before we know what is in it. That is not a partisan position. That is a fundamental transparency issue that should be passed by unanimous consent by the United States Senate tomorrow.

The legislation would allow for any Commissioner to ask for a vote by the full commission of any order that a bureau issues. According to Commissioner Pai's testimony, it has long been customary at the Federal Communications Commission to vote on any significant order if a Commissioner has requested such a vote. That practice has recently not been honored on two separate occasions. This is wrong. The Senate confirms nominees for the purpose of voting. There is no reason that I see to deny an up or down vote on any significant issue that a bureau orders. Again, this isn't partisan, allowing a vote on issues is the transparency that all of us should be for.

The legislation also empowers the Commission to operate more efficiently through the reform of the "sunshine" rules, allowing a bipartisan majority of Commissioners to meet for collaborative discussions subject to transparency safeguards. In fact, on this Senator Klobuchar has joined my effort and we have a standalone bipartisan bill.

There are many more ways we can help modernize the Federal Communications Commission. Such as allowing for a commissioner to publish the changes sought to an order, allow for three Commissioners to direct staff to work on an issue and mandate a cost benefit analysis for any rule that has an economic impact over $100 million would give all of us a clearer sense of the impact of a rule.

Mr. Chairman, you have been clear that you will seek to reauthorize the Federal Communications Commission in the coming months. I hope that you look at the Federal Communications Process Reform Act of 2015 and consider some of the legislative initiatives presented.

Thank you

Senator HELLER. I want to thank the Commissioners, also, for being here.

And, Chairman, thank you also for attending.

Today, what I'd like to focus on is how rules are adopted. And Commissioner O'Rielly, your opening statement or comments were near and dear to some of the comments I want to make today. But before I do that, I'd like to make an observation. The observation that I have is that it was my opinion that the purpose of the Affordable Care Act was to guarantee that all Americans have the same bad healthcare. And I believe that this Title II decision made by this Commission is to guarantee all Americans the same bad Internet service.

I also believe two things, and I don't believe I am wrong. One is, the purpose of this open Internet order is, one, to regulate and re-

strict content and, number two, has opened the door to taxation. What I'd like is Commissioners O'Rielly and Pai to tell me why I'm wrong.

Mr. PAI. Well Senator, I'll just tackle part of the question. With respect to taxation, you are absolutely right. The door opens the door to billions of dollars in taxes and fees on broadband.

With respect to reclassification, that alone, as the Order tees up, we're expecting to get a recommendation from the joint board on April 7 and it might be kicked off by a short period. But reclassification will lead to the imposition of new broadband taxes. And if you look at some of the new promises that some of the FCC is considering with respect to the programs administered under the Universal Service Fund, that extra spending has to come from somewhere. And that somewhere is going to come from the consumer's pocket.

In addition to taxation, one of the issues that has been relatively unremarked upon is the fact that reclassification opens the door to a lot of taxes on the state and local level. So, for example, with respect to state property taxes, a lot of jurisdictions taxed telecom providers at a much higher rate than they do general businesses or non-telecom broadband providers. In the District of Columbia alone, where we sit, D.C. imposes an 11 percent tax on general receipts, on gross receipts. That's immediately an 11 percent tax off the bottom line that the broadband providers are going to have to pay which costs are going to be passed on to the consumer.

And so, I think the taxation aspect of this, completely in respect to the Internet Tax Freedom Act which does not apply to fees that are associated with broadband, is so critical for us to keep mentioning because it does effect consumers where it hurts the most.

Mr. O'RIELLY. Senator, it would be impolite for me to ever suggest that any Senator is wrong, but I don't do healthcare anymore so I have no comment regarding that part of your point. But in terms of your substantive comment on the content, I might refine that and say I do believe eventually that this item, with the direction we're going, will get to edge providers. I made that point consistently.

And if you look at where we're going on interconnection and how far we've gone in interconnection, there are blurry lines between what is actually the middle mile and what providers are offering today in terms of their structure. And I do believe, eventually this is going to affect edge providers and the wonderful benefits that they bring to the American economy.

Senator HELLER. Commissioner O'Rielly, I want to go to your opening comments calling for amendments to a rule that at least 21 days prior to publication of a rule that it be displayed and made available to the public. And I don't think that is a partisan issue. I think that's an issue that we can all agree with. There are many other ways, I think, to make the FCC more transparent.

I've suggested, for example, that I have concerns with staff changes that takes place after votes have already been taken. I think all Commissioners should be able to ask for a vote on any order of bureau passes. Commissioners should be able to collaborate more freely. And I think any rule that impacts the economy

by more than $100 million should be subject to a cost benefit analysis.

Commissioner O'Rielly, I believe that that would make or increase the transparency in the collaboration of the Commission that you have. But I guess the question is, one, do you agree with that? And two, are there any other suggestions that you believe would add more transparency?

Mr. O'RIELLY. Sure.

So you suggested some really good changes that I would wholeheartedly agree and have advocated. I should make it clear, though, I don't think it is reflective of the item that we've just talked about. These should apply to across-the-board in going forward. It's not just about that neutrality that's indicative of some instances, but really it should apply going forward for everything; certainly on the 21 day availability.

But I have a host of ideas that I think that would help, and my time being a Congressional staffer and now being someone who has seen this for about 15 months, and you highlighted the delegation issue. You know, we have an ununiformed situation now where it's called our 48 hour rule. And in some instances, we are notified that we have 48 hours—we are basically given a heads-up for 48 hours. But only in certain instances. Sometimes it's 48 hours. Sometimes it's 24 hours. Sometimes it's zero. I get an e-mail on Friday from one of the bureaus and it said, "As a courtesy, we're letting you know."

That's how it comes. It's a courtesy they're letting me know what they're going to do. And I just think that's the wrong approach. I, you know, went through the process to get on the Commission to make as many decisions as possible. And I'm happy to vote in a quick and timely way, but I don't think it's something that is a courtesy I'm allowed to know what's happening at the Commission.

And we see that problem in the delegation area, where things get delegated, in many instances, by previous Commissions that I was part of and now the delegation authority continues and I don't even have an ability to track what is being decided by the bureaus separate from what is happening at my level.

Senator HELLER. Commissioner, thank you. I look forward to working with you.

Mr. Chairman, I look forward to working with you on reauthorization of the FCC. I do hope that some of these ideas, both myself and what the Commissioner just mentioned, could be put forth and looked at as we move forward.

The CHAIRMAN. And I appreciate the good work that you put into that already, Senator Heller. I look forward to working with you on it.

Senator Blumenthal.

STATEMENT OF HON. RICHARD BLUMENTHAL,
U.S. SENATOR FROM CONNECTICUT

Senator BLUMENTHAL. Thanks, Mr. Chairman, and thanks for working in such a bipartisan way on this hearing and on the bills that we'll be considering relating to these issues.

First of all, thanks to all of you for being here today.

Chairman Wheeler, I appreciate your remark about the wild and crazy CEOs and the wild and crazy Commissioners who might follow the present occupants of those offices. I want to assure you, nobody ever asks us about the wild and crazy Senators who may follow us.

[Laughter.]

Senator BLUMENTHAL. I'm not going to go any farther with that.

I want to express my strong support for the FCC's Open Internet order. This decision was unequivocal, emphatic, and epical in its affect. It was a victory for consumers and innovators that's all too rare in Washington these days. And I know that it will be challenged in the courts, and I want to commit to you that I would be pleased to lead whatever amicus efforts may be necessary to support it. I believe there will be a lot of support for such involvement by my colleagues, and I believe it is strongly grounded in the authority that the U.S. Supreme Court has provided repeatedly under Chevron, most recently, under Smiley V Citibank, and you alluded to it in paragraph 329 of the Order.

I also want to express my gratitude to all of you for joining in the bipartisan vote to repeal the sports blackout rule that I long called for with my colleague, Senator McCain. We plan to pursue that issue in the FANS Act because the sports leagues unfortunately have themselves continued to retain the power to blackout games through their private contract agreements.

And my special thanks go to Commissioner Clyburn for starting the proceeding, Commissioner Pai for going to Buffalo and announcing your opposition of the blackout rule, and Chairman Wheeler for focusing the agency's attention on this issue.

I want to express to all of you the action that you've taken strong and, again, emphatic action on cramming. And particularly to Commissioner Rosenworcel for coming to Connecticut and helping to educate consumers there about the pernicious effects of cramming and the attention that they need to pay to it.

But, again, this action on stopping cramming through the settlements that you reached with AT&T and T-Mobile, I hope will lead to rules that go beyond those settlements. As important as they were, I think that there need to be rules established in embodying the conditions that were expressed in those settlements that require express consent from subscribers before any third-party wireless company; any wireless carrier allows third-party's access to their customers' bills; ensure third-party charges are clearly and conspicuously identified on bills; and provide free service to consumers to block those third-party charges should they choose to do so.

And I'd like to know from each of you, you can say it simply yes or no, whether you commit to updating the FCC's rules to apply these requirements to the whole wireless industry and ensure all carriers protect their subscribers from all of these kinds of deceitful practices rather than profiting from them. And I'm assuming that you would agree. And you can indicate simply yes or no.

Commissioner Clyburn?

Ms. CLYBURN. Yes.

Mr. O'RIELLY. Yes.

Mr. PAI. Yes.

Ms. ROSENWORCEL. Yes. Cramming is pickpocketing and we need to stop it.

Mr. WHEELER. Yes, in two flavors. One, as you suggest and, two, we're going to keep enforcing.

Senator BLUMENTHAL. Thank you.

And I hope that it will be possible for those rules to be promulgated. I don't ask for a firm commitment, Mr. Chairman, but I'm hoping by the end of spring that we can anticipate those rule will be on the books.

I'd like to just turn, briefly, to the Comcast-Time Warner merger. As the FCC reviews this merger, I'd like your assurance, Mr. Chairman, that you will take into account anything that the FCC can do to protect consumers, because I think a number of us are concerned about the potential increases in prices and reduction in consumer choice that could come from continued excessive consolidation in the broadband marketplace.

Mr. WHEELER. Senator, as you know, this is an adjudicatory proceeding and I should not opine as we are sitting in judgment. The responsibility that we have is to make a decision in the public interest, convenience, and necessity. That'll be the basis of the decision, sir.

Senator BLUMENTHAL. Thank you.

Thanks, Mr. Chairman.

Senator NELSON [presiding]. Senator Markey, then Senator Gardner.

STATEMENT OF HON. EDWARD MARKEY,
U.S. SENATOR FROM MASSACHUSETTS

Senator MARKEY. Thank you so much.

And I want to congratulate you on your Title II decision. I think it's very consistent with the positions the FCC has taken over the years and including, Mr. Chairman, what you mentioned, in 1993, about the light-touch approach for the wireless industry under Title II that led to an explosion of hundred of billions of dollars of investment in that sector. That's in the best tradition of what the FCC does.

And I think under Title II, you'll be able to continue that as well, ensuring not only that there is a robust competitive marketplace but also that privacy is protected, that the rights of the disabled are also protected, that we moved to ensure that those additional protections are built into the law.

And I have a letter, Mr. Chairman, from 140 advocacy groups and companies who support the Title II decision of the FCC and I would like, by unanimous consent, to have this included in the record.

Senator NELSON. Without objection.

[The letter referred to follows:]

March 18, 2015

Hon. TOM WHEELER
Hon. MIGNON CLYBURN
Hon. JESSICA ROSENWORCEL
Federal Communications Commission
Washington, DC.

Dear Chairman Wheeler, Commissioner Clyburn, and Commissioner Rosenworcel,

We, the undersigned organizations and companies, thank you for your vote on February 26 to protect Internet communications from discrimination by reclassifying broadband access under Title II of the Communications Act.

Over the last year, nearly seven million Americans have contacted the Federal Communications Commission on this issue, with the overwhelming majority in favor of Title II reclassification. In addition, hundreds of advocates, civil rights groups, companies, entrepreneurs, and legal experts have spoken out in favor of Net Neutrality.

The FCC followed the letter of the law by voting for reclassification, and it heeded the calls of millions of Americans. You proved that sound policy that benefits the public interest can carry the day in Washington. Your vote will help keep the Internet open for years to come, free from slow lanes and gatekeeping, which will enable future generations to enjoy the greatest platform for free expression, democracy, and innovation the world has ever known. If Congress acts, it should consider the FCC's rule the floor, and not the ceiling, when it comes to the protections afforded Americans.

Those that support Net Neutrality and Title II represent a wide range of interests and political affiliations. What we have in common is an unwavering belief in the power of the Internet and the need to keep it open for the benefit of the public. This is not a partisan idea. Independents, Republicans and Democrats alike favor Net Neutrality by overwhelming margins.

Thank you for standing with the organizations and individuals across this country that defend and benefit from the open Internet.

Sincerely,

18MillionRising.org
Access
American Civil Liberties Union
Addy
Agile Learning Labs
AirHelp
American Library Association
Amicus
AppRebates
Appar
Apptology
Association of Research Libraries
Augur
Authentise
Automattic
Badger Maps
betaworks
Bitnami
Blu Zone
Boing Boing
BuzzFeed
Center for Democracy & Technology
The Center for Media Justice
Cheezburger
Codecademy
CodeScience
ColorOfChange
Common Cause
Consumers Union
Contextly
CREDO Action
Daily Kos
Demand Progress
Digg
Duffy, Inc.
Kongregate
LawGives
Leaflad
LendUp
Linknovate
Media Democracy Fund
MediaFire
Media Literacy Project
Media Mobilizing Project
Medium
Meetup
MixRank
Motionry
MoveOn.org
Mozart Medical
Mozilla
National Hispanic Media Coalition
New America's Open Technology Institute
Next Big Sound
NOTCOT
OfficeNinjas
OpenDNS
OpenMedia.org
Opera Software
PadMapper
Pixoto
Poll Everywhere
Popular Resistance
Presente.org
Public Knowledge
Publitas.com
Rallyware
ReadMe.io
Recrout
reddit

Distinc.tt
DuckDuckGo
Dwolla
DynaOptics
Earbits
Electronic Frontier Foundation
Embedly
Engine
Etsy
Faithful Internet
Fandor
Fight for the Future
Flytenow
Floor64
Foundry Group
Foursquare
Free Press
Future of Music Coalition
Gawker Media
General Assembly
GitHub
Global Accelerator Network
Grid
HayStack TV
HelloSign
Heyzap
Hire an Esquire
Imgur
Inside Social
Instapaper
Internet Freedom Business Alliance
inXile
Kaltura
Kickstarter
ReplySend
Reylabs
RootsAction.org
Savvy System Designs
Shapeways
SketchDeck
Sonic
SpoonRocket
Statwing
Stripe
SumOfUs
Techstars
TerrAvion
The Nation
TheNextWeb.com
ThoughtWorks
Tilt
TouchCast
Tumblr
Twilio
Union Square Ventures
United Church of Christ, OC Inc.
Upworthy
VHX
Vidcaster
Vimeo
Vox Media
Warby Parker
Women's Institute for Freedom of the Press
Women's Media Center
Worldly
Xola
Yanomo
Yelp
Zentail.com
Zynga

Senator MARKEY. I thank you, Mr. Chairman.

So I would like, if you could, just to talk a little bit more about Title II and how, in fact, it was rate regulation that made it possible for there to be a universal phone system across the country and, without it and the subsidies that flew within that system, that we could not have had Universal Service? But the opposite here is the goal of the FCC in terms of your intention to use the 1993 wireless precedent as the approach, which you think is wisest. Can you expand upon that again, Mr. Wheeler?

Mr. WHEELER. Thank you, Senator.

Well, I think there are actually two approaches, two historical approaches here. The first is the Internet wouldn't have existed if the FCC hadn't required that telephone companies controlled who was able to attach equipment to the phone network. And it was those old screeching Hayes modems that we bought and hooked up to our first-generation home computers that allowed the Internet to begin to take place. And so, the root of the Internet is in open access.

And then, the question becomes: Okay, how do you balance out the fact that there need to be consumer protections at the same point in time that you want to be incentivizing competitive construction of ever-faster speed capabilities? And it was clear that—and as everybody knows, I had an evolutionary process in my own thinking on this. And the realization that in 1993, what you had structured in Section 332 produced the kind of success where there

was not great regulation, there was not tariffing, there was not all these things that used to come with this old structure. And the most important thing there, Senator, I think is the realization that on the day after this order takes affect, the consumer revenues for the ISPs should be exactly the same if not better than the day before it took affect because we are not touching those.

And one of the things that's key here also is that, you know, when the President made his announcement and joined the 64 Members of Congress, including you and many on this Committee, who said that we ought to be doing Title II, the following day stocks went up. And so, if the concern was that there is a negative impact of this kind of light-touch regulation that allows rates to be set by the market not by government officials, there was a concern that that was going to have an impact on capital formation. It certainly has been disproved and disproved again after we made our decision and the stocks are beating the S&P.

Senator MARKEY. And if I may say this, what we've done is we've created, you have created a more predictable investment environment where we know the 62 percent of all venture capital 2 years ago went to Internet and software companies knowing that they could get in, reach to their customers, there would not be discrimination, that there would not be throttling, blocking, that they could reach their customers. That's where the energy is. That's where the growth is in this sector, and you've done a great job in identifying those tens of thousands of companies that are out there.

And similarly, I just want to say here that the Internet Tax Freedom Act originally passed, you know, in 1998, it prohibits states or local governments from taxing Internet access, electronic commerce, it's reauthorized every few years. And there's an Internet Tax Freedom Forever Act that Senator Thune has introduced that I'm an original cosponsor on. OK.

So I think, you know, we have to be careful in this area and I would just say to you, Commissioner Rosenworcel, that you've done a fantastic job, the whole Commission has, in focusing on the E-Rate.

As we pass new trade bills, as we speed up the pace of change in our economy, we have to make sure that we speed up the pace at which young kids get the skillset they need for the new jobs in our country. So if you're talking about TTIP or TPP and you want to speed up the pace of change, you have to speed up the pace of change for kids. And by raising the E-Rate from $2.4 billion to $3.9 billion per year, you're going to close that Homework Gap. You're going to make sure the kids in the poorest cities and towns, poorest homes, get access to the skillsets they're going to need to compete with the smartest kids in the world. And I congratulate you for that because it's a vision of what America has to be in this global economy.

I thank you, Mr. Chairman.

The CHAIRMAN [presiding]. Thank you, Senator Markey.

Senator Gardner.

STATEMENT OF HON. CORY GARDNER,
U.S. SENATOR FROM COLORADO

Senator GARDNER. Thank you, Mr. Chairman, for holding the hearing today.

Thank you to the Commissioners for joining us today.

Chairman Wheeler, I know Chairman Thune just covered this a little bit so I just want to, again, reiterate what he said. Last year, I led almost 90 Members of the House, Members of Congress signing a letter asking the FCC to adopt and implement a Connect America Fund mechanism for rural rate-of-return carriers that would encourage broadband adoption.

I know Chairman Thune and Senator Klobuchar led a very similar letter here. We talked about that earlier, and just wanted to again reiterate my support for a tailored updated CAF mechanism that would allow these carriers to move forward with broadband deployment in areas that truly need it. So thank you for your statements today.

Mr. WHEELER. Could I make a commercial here for a second? Just 30 seconds?

Senator GARDNER. Is it going to have the same unity that your answer did earlier?

Mr. WHEELER. Yes, sir.

Senator GARDNER. OK, all right.

Mr. WHEELER. The answer is: Yes, sir.

Senator GARDNER. Very good.

Mr. WHEELER. We are going to do that.

The great thing about the rate-of-return carriers is that there are these small, vibrant, heart-of-the-community kind of organizations in very small communities. Getting accord amongst them as to the best way to help them do their job is worthy of Henry Kissinger. And I hope that we can have the help of you and Senator Thune and the Committee to help send the message that says, "Hey, folks, it is time to quit bickering over details."

Let's have a common approach because we are going to move and we'll make that decision if we have to make that decision. But it sure would be good if we understood that the various segments of the industry could pull together and say, "Hey, this is the kind of North Star you ought to be guiding to."

Senator GARDNER. Well, thank you. And I appreciate that. And we're so close to each other, I feel like we ought to be having a cup of coffee.

Mr. WHEELER. We ought to have a beer.

[Laughter.]

Senator GARDNER. I'll take that.

Commissioner Clyburn, if there is one thing the FCC's Title II proceeding displayed, this is something Senator Heller has talked about earlier as well, the need for greater transparency for an order with such sweeping regulatory reach, it makes little sense the general public did not have access to the text of the Order until two weeks after the Commission voted on it. So my question to you, Commissioner Clyburn, is this: Should the FCC publicly release items put on circulation prior to a Commission vote, especially those that significantly impact the economy?

Ms. CLYBURN. One of the things that I liked to talk about in terms of this process, it is among the most open in the world. We had a notice and 4 million comments that allow people to weigh-in. One of the things I'm also cautious about when we talk of them, I'm open to any type of, you know, ways that we can improve the transparency and the like, is there is a deliberative process that takes place among us. And I would love for that to continue.

I am able to speak in unbridled fashion. And one of the things I am worried about in terms of releasing things, what I would say is, prematurely, is that could be compromised. If I have a question or a concern or want to get some feedback, I would not like for that to necessarily get out before I come to terms with the exchanges. There are APA issues, we're a quasi-judicial body, and I, again, abide by APA, you know, requirements. So all of those things, I think, need to be fleshed out before we make any type of move and direction.

Senator GARDNER. Thank you, Commissioner Clyburn.

Commissioner O'Rielly, I know spoke to this.

Commissioner Pai, would you like to add to this?

Mr. PAI. I completely agree that, especially with respect to meeting on ends that these documents should be revealed at least 3 weeks before the Commission vote. But for on this particular case, the fact that it wasn't revealed created a big haze of confusion both among net neutrality supporters and opponents. And what you saw in the days leading up to the Order was a substantial portion of the Order was revised with respect to the so-called "Broadband Subscriber Access Service" in response to a particular company and a special interest that wanted that removed for a variety of reasons.

And there is a great deal of press interest. If you Google it, so to speak, you will find a lot of people wondering what was this change about; how does it affect the Order; how are we going to respond to it? But, because of the Sunshine Prohibition, none of those people were able to have any input. If we had our product on the table on day one when it was circulated, the American people could see it and ultimately it would have made our work product a lot better. It would have helped it more legally sustainable.

Senator GARDNER. And thank you.

I am running out of time here and I have a couple of questions. So perhaps we could work on answers for the record talking about petitions, a number of petitions, before the FCC; USF clarity petitions for reconsideration, or forbearance petitions, other petitions that have been before the FCC, and wondering how we can make sure that these petitions are addressed in a timely manner. So perhaps you could get back to me, members of the Commission, get back to me on how we can—what internal processes should we change at the FCC to facilitate, to have a more timely processing.

And one last question, Chairman Wheeler. Twenty-five million-dollars has transferred out of the Fiscal Year 2016 budget from the Universal Service Fund to the FCC's general budget. I'm concerned that that could affect something that I am very, very concerned about and that's rural funding USF issues. Chairman Wheeler, what additional not-ongoing agency activities will this funding shift pay for?

Mr. WHEELER. Well, it's a proposed shift. And the attitude is this, the idea is this, the money has to be spent. That kind of money has been spent traditionally on the activities of the wireline bureau, the wireless bureau, and others on USF. We fund our auction activity through the revenues from auctions. The question is why should Universal Service activities be funded by people who were not involved in Universal Service. So why should a broadcaster have to pay fees for programs that they're not involved in? Why should, you know, some marine licensees? Why should, you know, et cetera, et cetera?

And so, all this was was an attempt say, "OK, how do we make sure that the gazintas and gazoutas are balancing each other out?" Because it has to be paid and, if the decision is that the Congress wants to say, "Hey, yes, you ought to make sure that broadcasters pay for this?" You know, so be it.

What we were trying to do was to say "What makes logical management sense?"

Senator GARDNER. So let me just clarify. So the $25 million isn't dedicated to anything, it's just being put back into the general budget.

Mr. WHEELER. The money gets spent. OK. So the question is: Does that money get raised by the general assessment that goes against everybody who is involved with the Commission or does it get raised through the program that it relates to?

And, you know, there will be a significant decrease for broadcasters, for instance, if they no longer contribute to something that they do not participate in.

The CHAIRMAN. Thank you, Senator Gardner.

Senator Booker.

STATEMENT OF HON. CORY BOOKER,
U.S. SENATOR FROM NEW JERSEY

Senator BOOKER. Thank you, Chairman.

First of all, I wanted to say thank you to all five who are serving our country. Often debates in Congress get personal, but every single one of you have done a great service in trying to achieve noble aspirations, noble goals. I'm grateful for your work. Some of the issues that individuals bring up have been really important to me. They won't get headlines.

Honorable Clyburn, criminal justice reform is critically important to me. And what you're doing and through your advocacy with your fellow Commissioners and with the Chairman is, to me, absolutely essential to end the nightmare of broken families and those linkages are so important for us to bring justice back to our legal system.

I just want to jump in and really, Commissioner Wheeler, give you a chance to just sort of address some of the things that I hear said consistently that I see no evidence for whatsoever. And I would just like to give you a chance to talk, for the brief time that I have, a little bit about this idea that somehow what you did was anti-business, that somehow it undermines the ability for companies to thrive in this marketplace.

Some of the other folks talked. I am a passionate believer in the importance of us to have a free and open Internet. Net neutrality,

it is critical for the growth for the American economy. And then, more importantly, as I would with kids, especially urban kids, and see that those skillset that they can learn the democratizing force of Internet access to democratize education and information, job opportunities, business opportunities, access to capital. All that excites me.

And so, as a guy who is kind of pro-business, I wonder if you can address the issue. Because, when I read that T-Mobile, Google, Cablevision, Windstream have acknowledged that using Title II with forbearance doesn't change their investment plans, executives at Verizon and folks from my state, Comcast, Time Warner Cable, Charter, have said the same thing to their investors, it's not going to undermine their investors. Wall Street and capital markets barely noticed the Title II news. And that's because investors understand the Order and that the FCC's Title II framework does not regulate rates or impose other so-called "utility regulations." So Wall Street didn't budge, the heads of companies that I know and talk with on a regular basis say that it's not going to affect their behavior.

So what these rules do, plain and simple, is keep broadband providers from discriminating. So will you just address the mountain of evidence rebutting the speculation about investment harms? And I think that users deserve the right to an open Internet, not just rhetoric, and how Title II in a sense, does not undermine but still actually, my opinion, could provide an environment where there's more investment in this space.

Mr. WHEELER. Thank you, Senator.

You know, I think it would be hard to find a bigger capitalist sitting at this table than me. I am a capital C capitalist and have been involved in starting companies and helping build companies for most of my professional life.

The key, there are multiple keys to this success of risk capital enterprises. One is that you have to have access to the consumer. The reason that Steve Case was able to build AOL as he was is because he had this open network that would scale like this. And, you know, he could get six people over here in some place in New Jersey and seven people in Boston and a couple of people over in Albuquerque and, excuse me I keep—and out of that, build a whole. If he had had to go serially to the various folks who provide services there and say "Can I get on? Can I get on?" which we had to do so many times in history, it wouldn't have been that kind of a success story. And so, open access is key to innovation and growth.

Second, you need to make sure that those who are providing that access are getting the rate-of-return that they deserve because that's the only reason they're going to invest the capital to build the pipes to begin with. And that has been a threshold issue with me from day one of this topic. And, again, I come back to the model that the wireless industry has used most successfully for their voice services and not having rate regulation; not saying this is what consumer prices are going to be; not having tariffing; not saying you've got to build something and then unbundle it. It is a structure that encourages the investment.

And I think that, third, that that is a reality that has been proved out by the market. As you said, Sprint says this works for them. T-Mobile says they'll invest. Google Fiber, who has never been regulated under Title II says, "Of course we're going to continue to build even though we are now under Title II." Cablevision comes on and says, "It's not going to change our business practices."

The small rural rate-of-return carriers that we have been talking about here in this hearing, they file in support of Title II with us because like everybody understands that, appropriately done, Title II provides certainty and serious opportunity for return.

Senator BOOKER. And I'm going to stop you there. I've seen the Chairman bench press. I don't want to tick him off.

[Laughter.]

The CHAIRMAN. Thank you, Senator Booker. We'll defer that from the record. No. We have Senator Daines up next.

STATEMENT OF HON. STEVE DAINES,
U.S. SENATOR FROM MONTANA

Senator DAINES. That's quite a statement from Senator Booker, too, saying that.

[Laughter.]

Senator DAINES. I'm not Cory Gardner. I just got moved up from the kiddie table here to get the full Thanksgiving dinner here. So good to be up here.

You know, my background was 12 years in technology, Cloud computing as part of a startup that we took public. And we were part of the free willing, Wild West of the Internet and seeing what that does for innovation and value creating here in American jobs. I'm one that believes in unconstrained innovation, speed-of-light commerce, and I'm just hoping that the only constraints that we'll see in this incredible story that is going on with the Internet is technology constraints but not regulatory constraints.

And so, it just gives me pause. And I heard, you know, I have great respect for my friends across the aisle here and some of the proof points they've demonstrated in terms of the capital markets didn't move with these announcements, the CEOs are saying things are going to be OK in some of these companies. I'm more concerned about where this all goes long-term. There have been a lot of hearings in Washington, when I go back in history of the records, where what began as perhaps well-intentioned, well intended, and good idea, turned into overreach. I have not seen many Federal agencies and regulations ever diminished; they tend to only grow.

And so, I'm looking where this all heads for kids and grandkids because I think we've got something very, very special here in America, which is this free and open Internet. So with that as background, I do want to shift gears and talk about the transparency and accountability of the FCC. I'm concerned about the Commission's routine practice of granting broadband editorial privileges to staff beyond just the technical and conforming edits.

Commissioner O'Rielly, you in your testimony discussed the promise that socially leads to broad staff editorial privileges, could

you describe some specific examples of what needs to be addressed to ensure a transparent and open process?

Mr. O'RIELLY. Sure.

So I've had difficulty in the last meeting. The Chairman asked for a right—the bureau asked for a right for editorial privileges and I objected. And part of the reason is because I had an opportunity to look at our manual and they're actually not contained within—there are no fast and rules on what we have. They are just practices that we've written down in this consumers, you know, Commissioner's guide to what the agenda meeting should be. So what I've suggested is, one, we ought to codify our practices here rather than just have them as free flight floating. But, two, I've had a problem with the practice itself because what has been encompassed within editorial privilege has not been just technical informing it has also been to the text itself and substantial changes.

In fact, early on in my time the changes were quite, I want to be careful in my wording, but they were quite negative to one of my colleagues in terms of what was being, you know, what the changes were being suggested. It's unnecessary to criticize another one of my colleagues when it's something that I had voted for. It's unnecessary to do that in the text.

Senator DAINES. So along that line, were there staff editorial edits made to the Open Internet order after the Commission voted on February 26?

Mr. O'RIELLY. Yes.

Senator DAINES. Were you allowed to discuss those changes made to the Order?

Mr. O'RIELLY. Well, I think I can suggest there have been changes since the item we voted on and to the item that was released. One of them was that they, you know, had to effectively had to backtrack on the Chairman's speech regarding the, as pull out the specifics here, regarding the peering issue. He had argued that it was going to be done separately and not part of this item and the interconnection issue was going to be separate. And here they actually put a footnote in and said, "No, no, it's actually contained in here." They had to actually back out his own statement in the correction.

Mr. WHEELER. Can I, just to be clear on that, Mike. This, what you're quoting, was a speech that I made over a year ago in which I said, "you know, I'm not so sure that—" I have been saying throughout this process, you know, as we led up to it, that interconnection needed to be on the table. This was not an editorial decision that was made in secret. This was a policy decision that was put forth to everybody.

Senator DAINES. Let me bring it back here——

Mr. WHEELER. But, look, can I also say I would like to identify myself with Commissioner O'Rielly and the points that he made in his blog. I think he made some really valid points and I think that we have to deal with this. He and I both walked in essentially the same time and at the same time——

Mr. O'RIELLY. Same day.

Mr. WHEELER [continuing]. And were handed—well, I was a couple minutes before.

Senator DAINES. But let me ask you——

Mr. WHEELER. But——

Senator DAINES. Chairman Wheeler, excuse me, than why did you choose not to have the entire Commissioner revote on the revised Internet order on March 12, especially if the FCC staff made substantive editorial change?

Mr. WHEELER. So the changes that got made were changes that were in response to dissents which we required by law——

Senator DAINES. And I guess, just in the spirit of transparency, could you just make that February 26 order is available to us?

Mr. WHEELER. Sure. It's on the website.

Senator DAINES. OK. OK.

Mr. WHEELER. But let me be——

Senator DAINES. Twenty-sixth, February 26.

Mr. WHEELER. It's on the website, yes.

Mr. O'RIELLY. On the final one, is he saying on the one we voted on the day of?

Senator DAINES. Right, what was finally voted on on February twenty-sixth?

Mr. WHEELER. The final order is on the website. And that's the public doc but the issue here that we're——

Senator DAINES. I don't believe it is. We will follow up on that but maybe we could get to the bottom of that. And I think that it gets to the issue right now of transparency and accountability we've got even within the Commissioners here.

Mr. WHEELER. Mike, the final order is not on the website?

Mr. PAI. The document as we voted on, on February twenty-sixth, is not on the website.

Mr. WHEELER. The final document as required——

Senator DAINES. Right, but my point is that that vote ——

Mr. WHEELER.—by the process in the law——

Senator DAINES. Well, the question has changed back and forth so then prove the transparency around the process.

Mr. WHEELER. So I'd like then to associate myself with Commissioner Clyburn who was absolutely right when she said that this is an editorial process. And the going back and forth, if we open that process up, there are multiple things that are going to happen. Markets aren't going to understand, "well, you know, Commissioner Clyburn wants to change glad to happy. What's that mean?"

This is a quasi-judicial role that we exercise. We need to be going through and having the ability to, *in camera,* have our own discussions.

But, 30 seconds more, sir.

I think there is a misunderstanding that the end of the game is the final rule, because what happens is you put it out, you publish in the *Federal Register* and the next thing that happens is that people are going to file for reconsideration. And what is reconsideration? Reconsideration is the entire decision is out there for everybody to see, and then the public comes in and comments and says, "No, we would think you ought to reconsider this." And we're going to have to vote again.

Senator DAINES. Right. And I'm out of time, but just let me summarize by saying, you know, the stakes are awfully high as we're looking at something as of stepping into Title II and to the Internet. And I would hope that we could work together here to improve

the accountability and transparency of that process so that we, one, can ensure we have trust as well as better outcomes. And with that, I'm out of time.

Thanks, Mr. Chairman.

The CHAIRMAN. Thanks, Senator Daines.

Senator Schatz.

STATEMENT OF HON. BRIAN SCHATZ,
U.S. SENATOR FROM HAWAII

Senator SCHATZ. Thank you.

Chairman Wheeler, thank you for enduring today's hearing and yesterday's hearing.

And thank you to all of the Commissioners for you great work. We really appreciate it.

I want to thank the Chairman for the bipartisan process that he has undertaken to explore the possibility of legislating in this space. I'm not clear that we're going to be able to get there because I think that we don't have a meeting of the minds even on the kind of basics of a negotiation. Which is to say, it's hard to imagine that President Obama or House and Senate Democrats would agree to legislation that would undermine the basic principles of net neutrality.

I think there is some openness among some of us to enshrining those net neutrality principles in statute, but if we're unable to kind of reach the common ground in terms the beginning of a negotiation, than I'm not necessarily hopeful. But I think it is worth exploring. I think it is worth discussing. I'm a little concerned about the litigation risk not just on the Title II side but on the forbearance's side.

So I think it's worth exploring but I also think we ought to be direct with each other about what's realistic in terms of a legislative strategy or litigation strategy. And I'm not sure that at some point we're not going to have to decide which it is and what's the most practical course of actions.

Can you tell me, Mr. Wheeler, how you arrived at the forbearances? Did you sort of start with the net neutrality principles and then forbear everything else? Or, how did arrive at those forbearances?

Mr. WHEELER. It's a great question. Thanks, Senator.

We started with back to Section 332 and Senator Markey and those 19 that clearly have experience as shown are not necessary. And then, we went through and said, what are other ones that in this situation are not applicable? And that got us a list of 27 from the 19 of the earlier.

Senator SCHATZ. So what remains that isn't the sort of four principles of net neutrality but also that hasn't been forborne?

Mr. WHEELER. I mean I won't go through the list but the highlights, OK, the big ticket items.

Senator SCHATZ. Please.

Mr. WHEELER. Section 201 and 202, which is basically where this just and reasonable test resides; Section 208, which is the consumer protection aspect; Section 222, which is the privacy activities; Section 254, which is universal service. And that's probably the first hand of priority issues.

Senator SCHATZ. Is it fair to say this is unprecedented in terms of the number of things that have been forborne? Has that been done before at that sort of scale?

Mr. WHEELER. Well, they were done—it was done for Section 332 and has stuck.

Senator SCHATZ. That it has stuck.

Mr. WHEELER. And has stuck.

Senator SCHATZ. And has——

Mr. WHEELER. And has been successful.

Senator SCHATZ. And has the Commission, in its history, undone a forbearance? I think people are calling it un-forbearing, but has the Commission—there's this concern that, well you may have forborne all of these provisions in the statute but that doesn't prevent the future FCC from—I mean, is there any evidence that a future FCC would do that in the future based on past actions?

Mr. WHEELER. That's the right question.

Here's the issue: So Section 10 of the Act instructs us how we forbear and that we must forbear if certain things are met. If you were to go and reverse that, there would have to be an on-the-record notice and comment proceeding that follows Section 10 and says here is the record that builds to de-forbear. So technically you could. Realistically, there is a lot we have to go through.

Senator SCHATZ. You are actually on my question now, which is: How procedurally and legally would you kind of do the evaluation? And then, on an operational level: How would you forbear? But I guess my question is, in the FCC's history, has it undertaken to undo a forbearance and does it do that?

Mr. WHEELER. Not that I am aware of, sir. And, again, what you would have to do—so for instance, let's just hypothetically say, 5 years from now somebody wants to come in a de-forbear on rate regulation. There's going to be a serious test that has to be done to say what is it that has changed, and that of course will be an appealable decision itself. And it will be an open proceeding. And it will have everybody in the country involved in it. And so, I think the ability to de-forbear is going to be a high bar to hurdle.

Senator SCHATZ. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Schatz.

Senator Cantwell.

STATEMENT OF HON. MARIA CANTWELL, U.S. SENATOR FROM WASHINGTON

Senator CANTWELL. Thank you, Mr. Chairman.

I am reminiscing of the time that we had a major discussion about FERC's use of just and reasonable and Enron's manipulation of energy markets. And even though just and reasonable was in place, the majority of commissioners still struggled with a long time about whether manipulative rates could ever be just and reasonable.

So I would suggest that that interpretation of just and reasonable is probably going to be left up to the determination of whoever is in the majority of the Commission. So hopefully people will get some common ground on that and a framework. But thank you for your work.

I'd like to follow up on Senator Fischer's question as it related to the auction of spectrum since, you know, people are saying, "Well, we want to get right, but we also want to get it done." And when we're talking about a delay for a third time, I just want to make sure that we have all the tools and all the information we need now; resources to get us there given that, I think, this is for our rural communities. Something that we really need to pair with resources so that we could get robust broadband networks out there.

So I just want to go back over what we think. You know, do we have any problems that are undiscovered here that we think is going to cause us problem in actually getting this done? In the fall of 2015; starting the auction in 2016?

Mr. WHEELER. It has never been tried.

Senator CANTWELL. It has never been what?

Mr. WHEELER. It has never been tried.

That's a huge problem, Senator. You know, we are inventing from whole cloth. So, for instance, when I walked in the door I said: "Wait a minute, we got to have a timeout here." Because I come from a software background, like you, and I've never seen code work the first time and we didn't have an appropriate testing structure in place and all of this sort of stuff.

And so, we delayed 6 months while we could put a red team in place; while we could do the kinds of things that normally get done with software. But having said that, I believe that we will be able to begin the auction in the first quarter of 2015. I'm sorry, 2016.

Thank you.

And we are managing to stick to that goal. We will be bringing forth to the Commission later this year in ample time for the people who might be bitters, the final package of rules that bitters will be using. We are on road trips, which I guess I'm not supposed to call road trips, information sessions around the country, meeting with broadcasters and sitting down helping them understand what the financial considerations that they want to keep in mind are. And we are managing this for a first quarter of 2016 auction.

Senator CANTWELL. Besides the, you know, uncertainty of trying it, are there any other obstacles that you see at this point?

Mr. WHEELER. We have a lawsuit that we have to get through here that the NAB and a broadcaster have filed, but I'm confident that we'll get on the other side of that and be able to move on. We have a situation where, you know, when you start talking about spectrum, everybody wants a piece or to keep their piece or to not change. We need to deal with that. You know, Commissioner Rosenworcel's incredibly valid point about unlicensed spectrum; we need to make sure there's unlicensed spectrum in here.

At the same point in time, Congress instructed us to use the spectrum that wireless, microphones, and others have been using. We've got to find homes for them. I mean, I believe this is all doable. I do not underestimate the challenge, but we have now been at it for 3 years and I can see light at the end of the tunnel. And better than that, we are managing to that date.

Senator CANTWELL. OK. I saw inclinations to speak but I have half a second. I mean a half a minute left.

Mr. PAI. Well, Senator, if I could jump in? I think the biggest challenge we confront right now is the complexity of the auction as it is currently structured.

Just to give you two examples of that: First, the dynamic reserve pricing proposal which is on the table. It's exceedingly difficult for members of the Commission, myself, to understand exactly how it will work in real-time. And when you're dealing with a broadcaster community that is unused to dealing with these kinds of auctions at all, it's going to be exceptionally difficult. And if we want to incentivize them to participate, this proposal essentially would undercut the amount of money that the market would determine they are eligible to get from the wireless carriers in the auction.

The second example of complexity is the potential of variability in the banned plans. And so, you would have some situation in which some spectrum might be occupied by a wireless carrier. In an adjacent market, it might occupied by a broadcaster. How that interference will work is a very complicated issue and we have to get it right. We only have one shot. Otherwise, you end up with very difficult situation for the carriers and the broadcasters alike.

Mr. WHEELER. And what Commissioner Pai is talking about are those kinds of issues I was referencing that we have to deal with this year.

Senator CANTWELL. Thank you, Mr. Chairman. That's why I asked the question because I wanted us to expand on it a little bit so we can get through those.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Cantwell.

Senator Johnson.

STATEMENT OF HON. RON JOHNSON,
U.S. SENATOR FROM WISCONSIN

Senator JOHNSON. Thank you, Mr. Chairman.

Chairman Wheeler?

Mr. WHEELER. Yes, sir?

Senator JOHNSON. The FCC is an independent agency commission created by Congress and accountable to Congress. Correct?

Mr. WHEELER. Yes, sir.

Senator JOHNSON. I kind of want to walk you through a timeline here. I really only just need yes or no answers here just to confirm that I've got this right.

On January 14, 2014, the D.C. Circuit struck down portions of the FCC's 2010 Open Internet order. Correct?

Mr. WHEELER. Yes.

Senator JOHNSON. In that decision, the D.C. Circuit provided the FCC with the roadmap to follow an order to craft net neutrality rules that it would uphold. Correct?

Mr. WHEELER. They said——

Senator JOHNSON. Just——

Mr. WHEELER. I know but I——

Senator JOHNSON. Quickly.

Mr. WHEELER. Section 706 was a solution if you were not going to do Title II. The reason we were throwing out this decision, the court said, is because you did not use Title II.

Senator JOHNSON. So they gave you a roadmap.

Then, on February also 2014, you announced your intent to file the roadmap the D.C. court laid out. Right?

Mr. WHEELER. Correct.

Senator JOHNSON. In April 2014, you circulated Notice of Proposed Rulemaking that tentatively concluded the FCC should base its net neutrality rules on its authority under Section 706. Correct?

Mr. WHEELER. Yes.

Senator JOHNSON. That rulemaking was voted on in May 2014. Correct?

Mr. WHEELER. Yes.

Senator JOHNSON. According to reports, you were planning on holding a vote on that net neutrality order in December 2014 based on Section 706 or hybrid approach. Correct?

You announced your intentions——

Mr. WHEELER. 706 or a hybrid approach? No.

Senator JOHNSON. Right.

Mr. WHEELER. No.

Senator JOHNSON. You did not——

Mr. WHEELER. No. What we were trying to——

Senator JOHNSON.—announce your intention to hold a vote on the——

Mr. WHEELER. Yes. I did say we were trying to do things in December and what we were trying to manage to, at that point in time, was a Title II Section 706 approach. Not an order.

Senator JOHNSON. On November 10, 2014, President Obama announced his support for regulating the Internet under Title II. Correct?

Mr. WHEELER. Correct.

Senator JOHNSON. Were you aware of that announcement before he made it?

Mr. WHEELER. They came to see me November 6, I believe.

Senator JOHNSON. So you were made aware of that a few days before that?

Mr. WHEELER. Yes, sir.

Senator JOHNSON. Ultimately, you decided not to hold a vote on the net neutrality order in December. Correct?

Mr. WHEELER. That's correct. We couldn't get it done.

Senator JOHNSON. Yesterday, you told the House Oversight and Government Affairs Committee you delayed the vote because you did not have the time to "Whip the horses to complete an order in time for the December 2014 open meeting." Correct?

Mr. WHEELER. I think I used some metaphor like that.

Senator JOHNSON. OK.

Finally, the FCC voted to reclassify broadband services as telecommunications services under Title II on February 26, 2015. Correct?

Mr. WHEELER. Yes, sir.

Senator JOHNSON. The next day, on February 27, the Democratic National Committee, the DNC, sent an e-mail boasting that "The FCC has approved President Obama's plan."

Were you aware of that blast?

Mr. WHEELER. I saw it after it went out. I saw it after it went out.

Senator JOHNSON. Now, based on the actions of that timeline, do you think an objective observer taking a look at those actions would really view your actions as Chairman of those of an independent Chairman of an independent agency?

Mr. WHEELER. Yes, sir.

Senator JOHNSON. You don't think somebody could come to the conclusion that you were just really carrying water for this administration?

Mr. WHEELER. No, sir. I was looking at a Title II in Section 706 approach before the President filed his position and we came out with a Title II Section 706 approach. The President, in his filing, did not suggest we should cover interconnection. We covered interconnection. The President did not suggest the breadth of the kind of forbearance that we have talked about. And the President talked only in terms of doing something with Title II. So I think that, actually, what we came out with is stronger as well as more deregulatory than what the President filed with us in his part.

Senator JOHNSON. Commissioner Pai, were you a little surprised at the about-face of Chairman Wheeler in respect to his order on Internet?

Mr. PAI. Not sure if I was surprised but I was disappointed that the independence of the agency, in my view, had been compromised by the imposition of the political considerations by the Executive Branch.

Senator JOHNSON. Can you describe or are you concerned about potential lawsuits under those rules and regulations that currently are going to be forborne, whatever that is, under this current rulemaking?

Mr. PAI. Absolutely. I think there are significant legal flaws in the Order throughout, and I've detailed them in my dissent. With respect to forbearance alone, I think the fact that the FCC crafted a novel and completely unprecedented competition analysis, which is essentially we don't have to do one in order to forbear, was unprecedented. The fact that the Order repeatedly uses the phrases "we forbear for now" or "at this time" was unprecedented. The fact that the Order never gave notice of the specific provisions from which it might or might not forbear was unprecedented.

I think the jettisoning of a lot of the forbearance precedence, which at its core dates to Section 10 of the Communications Act, was unprecedented. And I think review in court will have a great deal of scrutiny to apply to some of the decision with respect to forbearance.

Senator JOHNSON. There is going to be a great deal of uncertainty in terms of investment and in terms of people and how they view the Internet over the next few years, isn't there, because of this ruling?

Mr. PAI. Absolutely. And if I could just elaborate on that a little bit? I mean, the companies that are responsible for the largest capital expenditures in this industry have told us that Title II will impede investment. The smallest providers have told us the same thing. And if I might quote from a letter we got on February 10, Title II regulation will undermine the business model that supports our network, raise our costs, and hinder our ability to further deploy broadband."

And you might ask what corporate titan wrote that statement. Was it a Comcast, an AT&T, or Verizon? It was 43 municipal broadband providers, including the very broadband provider that President Obama visited in the weeks leading up to our February 26 vote, who told us that Title II is a roadmap to a regulated monopoly. That is not something that creates the incentives to invest and innovate.

Similarly, on the mobile side the argument has been made repeatedly that this sort of deluded Title II that has existed since 1993 is a recipe for success. And I would suggest to you that's completely not the case. First of all, the reason we refrain from rate regulation and the other Title II regulations on mobile was because the FCC explicitly found that there was competition in the wireless marketplace and so that these regulations weren't necessary but the market forces would protect the consumer.

Here in the net neutrality order, the agency specifically says there is not a sufficient competition which is part of the reason why Title II is necessary. And similarly, with the arguments made, well people are going to invest anyway.

And, look, the bottom line is these broadband networks don't have to exist. I mean, the fact that Google Fiber is deploying is unremarkable. What is remarkable is the fact that, right now, Google Fiber does not offer voice service. Why? It would cost zero. I mean they've already built the fiber.

The reason they accepted this on the record is because there are Title II regulations that apply to voice. And it strains credulity to think that on one hand you could apply Title II regulations that are even stronger than what the President suggested, but on the other hand that revenues aren't going to be affected. You can't say on one hand we're forbearing now from Universal Service Fund contributions but on the other hand tee up, well, in a couple of weeks or months that we're going to increase broadband taxes to fund some of these promises under the Universal Service Fund.

You have to pay the piper when it comes to Title II. And the proof is going to be in the pudding in the months to come, not in the ephemeral stock variations.

Mr. WHEELER. So, Senator, can I——

Senator JOHNSON. My time is up. I always say if it's not broke don't fix it. And I would say there are a lot of people having buyer's remorse on this rulemaking.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Johnson.

Senator Moran.

STATEMENT OF HON. JERRY MORAN,
U.S. SENATOR FROM KANSAS

Senator MORAN. Mr. Chairman, thank you very much.

Commissioners and Mr. Chairman, thank you for your presence today. I look forward to this conversation. I have appreciated what I have heard so far. I look forward to seeing, at least some of you, in the appropriations process.

Mr. WHEELER. We'll see you again.

Senator MORAN. I will see you again. All of the Commissioners——

Mr. WHEELER. I think Commissioner Pai and me just like last time.

Senator MORAN. All right.

Well, I have had on one-on-one meetings with each of you, other than Commissioner O'Rielly, and I would welcome that at some point in time when it fits your schedule, Commissioner. And I actually have enjoyed the conversations that we've had and I appreciate the respectful manner in which those have occurred.

Let me ask about, as you would expect, my focus will be upon rural providers and consequences to rural America. First, on net neutrality and then I will shift to the E-Rate issue. On net neutrality, one of the providers has shared with me that the regulatory burden they currently exist, they have a calendar of things they do to comply with the regulations. Three pages in front of me, the amount of time they indicated that it would take—first of all, I should tell you this is a less than 20 employee business, covered less than 1,000 square miles of service territory, has less than 2,000 customers. And their calendar indicates that it would include 62 different Federal filing mandates that would require 1,490 manhours, person hours. And I am worried that net neutrality, the Order that the Commission has entered, will only increase that burden and in the same way I think that mandating health insurance is only valuable if you can find a doctor. Mandating network management rules does nothing to protect the person who has access to broadband.

And many of our conversations, Commissioners, one-on-one, have been about access to folks who live in rural places in the country. And so, I'm going to ask Commissioner Pai this question.

Mr. Chairman, I'm reluctant to ask you because I would lose all my time in your answer.

[Laughter.]

Senator MORAN. And so, Commissioner Pai, how does the net neutrality rules impact rural providers? Did the Commission collect data that would provide the Commission evidence input before making the decision related to net neutrality as to the cost of compliance and ultimately who pays the price of those regulations?

Mr. PAI. Fantastic questions all, Senator, and thank you for your concern.

I think that Title II is going to have a devastating impact on rural broadband customers. And the simple reason is that it's a challenging enough business case as it stands to build broadband networks in rural America given the sparse population, the great distances, et cetera. When you layer on top of that Title II regulations, you are going to make it exceptionally more difficult for broadband companies to take the risks to deploy the capital to make that infrastructure work.

I use the example from my hometown, which you know well, Wave Wireless, which supplies broadband Internet service to my own parents. As it is, it's tough for them to get reasonable alternative when it comes to broadband. Wave has said it's going to be challenging for them. They are going to have people to comply with these regulations. It's not going to be easy for them to deploy more infrastructure in the field.

And the FCC, unfortunately, neglected the only credible evidence when it comes to rural broadband deployment, which was the statements of the many, many companies that wrote to us and said Title II is a bad solution for these small rural broadband providers and the competitive alternatives.

For example, we got a letter from 24 of the country's smallest ISPs. All of which serve less than 1,000 customers. One of them serve four customers in Cannon Falls, Minnesota. And they told us that Title II will badly strain our limited resources because they have in-house attorneys and no budget line items for outside council.

Repeatedly, we have heard from some of these smaller providers that Title II will reduce their ability to compete. One of the great ironies to me of Title II in this entire debate has been the key thing that people say, I think, where they mean when they say net neutrality is that we want more competition. We want more broadband providers offering better choices at better prices at faster speeds. Title II takes us exactly in the opposite direction because it's going to be, by definition, heavy-handed regulations disproportionally affects smaller competitors. We see this all these other regulated industries.

Senator MORAN. Commissioner, so I don't get accused of being biased, I want to make sure that you don't take all my time either.

[Laughter.]

Mr. PAI. Senator, I thought we had an understanding here.

Mr. WHEELER. I want to set a record for a 30 second response.

The record and the information that we gathered in the record does not ignore the question you asked, as has been suggested. The NTCA, the association that represents all of these small, 20 employee kinds of companies filed, again, obviously representing a consensus in their industry, saying they supported Title II in this open Internet order.

Mr. PAI. This is absolutely critical. What they supported with respect to Title II is a last mile connectivity they already offer as a Title II transmission service. They did not support the broad assertion of Title II jurisdiction over interconnection of the entire——

Mr. WHEELER. No, I think you're——

Senator MORAN. Next time I'm going to ask Commissioner O'Rielly.

[Laughter.]

Senator MORAN. And perhaps either Commissioner Rosenworcel or Commissioner Clyburn can respond.

Thank you very much for that answer. My time is up. We always say that before we ask the next question. And what I would say is that we have a great appeal that's been on file for 4 years. We have asked you to respond. It has not been responded to and I would ask your commitment that you would get the details from us and——

Mr. WHEELER. I'm sorry. What is it—yes. There's an appeal?

Senator MORAN. Kan-ed, yes. An appeal, for four years, for rates that were established that—they filed, I'm sorry. They filed in 2011 and it is a case dealing back to the funding of 2005.

Mr. WHEELER. Great. Yes, sir.

Senator MORAN. So we'll follow up and give you all the details.

Mr. WHEELER. You'll have an answer fast.

Senator MORAN. And Mr. Chairman, thank you very much. I'll submit the rest of my questions for the record.

The CHAIRMAN. Thank you, Senator Moran.

Senator Cruz.

STATEMENT OF HON. TED CRUZ,
U.S. SENATOR FROM TEXAS

Senator CRUZ. Thank you, Mr. Chairman.

Commissioners, thank you for being here.

The Internet has proven to be an incredible haven for innovation and for opportunity. And I believe the Commission's Order poses a profound threat to continued innovation on the Internet and, in time, will hurt small content providers and favor large corporations with influence in Washington.

I also believe the Order is contrary to law. I'd like to ask you, Mr. Chairman, initially just a simple question. In the Order, am I correct that what the Commission has done is now to treat broadband providers as common carriers?

Mr. WHEELER. Yes, sir.

Senator CRUZ. How then, Mr. Chairman, does the Commission justify that given that last year, when the D.C. Circuit struck down the Commission's previous failed attempt at regulating the Internet, the D.C. Circuit said, on page 45 of the opinion, "We think it obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers."

Mr. WHEELER. Sir, I would be happy to get a specific legal response for you on that. I think that what the court was saying was that the Commission was imposing common carrier-like regulation without stepping up and saying you are a common carrier. And that's what essentially that statement says, I believe. They were saying you are violating the Communications Act if you are doing these common carriage-like requirements without making a finding that in fact they are common carriers.

And that was the gut of that.

Senator CRUZ. Well, let me ask, the specific Order that was put out, was it subject to ordinary notice and comment? And specifically, was the public able to look at the details and comment on it before it was adopted?

Mr. WHEELER. There was a full notice and comment proceeding and longer than average——

Senator CRUZ. Mr. Chairman, let me ask that question again. Was the public able to read the specific details and comment on the specific details of this order before it was adopted?

Mr. WHEELER. The Order was put out in keeping with the total process, the precedence of the——

Senator CRUZ. Mr. Chairman, you are avoiding saying the word no.

Mr. WHEELER. Because with due respect, sir, the O'Rielly rule, never disagree with the Senator.

Senator CRUZ. My question is simply: Was the public able to read the Order and comment on it before it was entered? The answer is no, correct?

Mr. WHEELER. That is not the way the process works in the FCC.

Senator CRUZ. I didn't ask you——

Mr. WHEELER. I believe that's an answer.

Senator CRUZ. Mr. Chairman, I did not ask the way the process worked. I asked: Was the public able to read and comment on it before it was entered? There's either a yes or no. Either, yes, you could go and read it before it came into effect, or, no, you could not.

Mr. WHEELER. The public never reads orders, sir. So the answer to that is——

Senator CRUZ. The answer is no.

I would note that just a few weeks ago President Obama's executive amnesty was enjoined by a Federal court for a violation of notice and comment. And I think the Commission's action represents an abuse of its authority.

Let's shift, though, to the effect of this Order. Treating broadband providers as common carriers, putting them under Title II, treating them as public utilities subjects them to Section 201. Section 201 gives the Commission the authority. According to Section 201, all charges and practices shall be just and reasonable. Is that correct?

Mr. WHEELER. Correct.

Senator CRUZ. I want to understand the effect of the Commission's order. It is the Commission's position is that it has full legal authority from this day forward to regulate every charge and every practice of every broadband provider to determine whether they are just and whether they are reasonable.

Mr. WHEELER. We have said, sir, that we believe this should operate the same way that Section 332 has and that has not been the result.

Senator CRUZ. But, Mr. Chairman, you seem to be misunderstanding my question. I understand that you're currently telling us you're going to forbear from using this authority. My question is to understand what legal authority the Commission is claiming.

Mr. WHEELER. 201 is the legal authority. We are using 201 and 202 in this order.

Senator CRUZ. So I am correct that it is the Commission's position that it has the legal authority to regulate every single charge and every single practice of every broadband provider and to determine in the Commission's own judgment whether those charges and those practices are just and reasonable?

Mr. WHEELER. There has been removed from the item the procedures that the Commission would use to do that; as in tariffing, as in retail rate regulation——

Senator CRUZ. But all of that is a matter of forbearance.

Mr. WHEELER. Those tools——

Senator CRUZ. You're not arguing that you lack the legal authority. You're saying right now you're refraining from doing that. Correct?

Mr. WHEELER. No, sir. I'm arguing that the tools to make that happen, tariffing ability, rate regulation ability, have specifically been removed and that we expect the 201 will function as it has for the last 22 years in wireless.

Senator CRUZ. Well, Mr. Chairman, would you support legislation from this Committee codifying the forbearance you're suggesting, explicitly prohibiting the Commission from regulating the

rates or practices of broadband providers? Since you claim right now that we should trust the Commission you'll never do that, would you support legislation making that explicit?

Mr. WHEELER. So I would need to be real careful on that. I would be very happy to provide input to the Committee. I want to be careful about saying I'm endorsing legislation or arguing against legislation or whatever. I think the point you raise, however, is that in any open Internet rule or legislation there should not be consumer rate regulation.

Senator CRUZ. Let me ask one final question. My time is expiring. But, Commissioner Pai, would you share with this Committee what the impact is likely to be of this Order on consumers; the taxes and the impact on innovation and opportunity online?

Mr. PAI. It's a terrific question, Senator Cruz. Thank you for it. The impact is going to be substantial.

First and foremost, consumers' broadband bills will go up. The door is open to billions of dollars in new taxes through the Universal Service Fund contribution. An independent study has suggested it's going to be $11 billion each and every year. That assumes that the FCC doesn't increase the amount it has promised to spend on some of these Universal Service Fund programs.

Additional, these fees are going to go up as a result of the increase in state and local taxes that broadband providers are going to have to pay as a result of reclassification. Telecom providers traditionally pay a higher rate than non-telecom providers. The fees are going to go up, additionally, because poll attachment rates are going to go up. Right now, a lot of the broadband providers pay at lower 224(d) rate. That rate is going to go up to the 224(e) rate. That cost has to be borne by someone. It's going to be borne by the consumer, and that's just the bills.

In terms of the actual service, the reduction competition that Title II is going to work across this country, but especially in rural America, is going to be substantial. You've heard our exchanges about how some of these smaller ISPs, in particular, are going to have to either, you know, suck up the cost or go out of business altogether.

Additionally, some of the larger providers are going to have to include a line item whenever they're thinking about deploying infrastructure. Will the Commission employ Section 201 authority to second-guess infrastructure we're putting in place for interconnection? The three routes that traffic has to go over could be second-guessed by the Commission. All of these things now go through the FCC as gatekeeper.

Third, consumers are going to suffer as a result of the second-guessing the FCC is going to do through the Internet conduct standard. As the Chairman pointed out, we don't really know where this is going to go, that the FCC is going to sit there as a referee to throw the flag.

But the problem is nobody even knows what the game is, what the rules are. And I think when the FCC explicitly tees up pro-consumer things like T-Mobile's music freedom, which allows, you know, the free streaming of music videos or music content to your Smartphone outside of data caps, and says that may be an Internet violation. Then, ironically enough, it's going to be some of the com-

petitive wireless upstarts who want to challenge the big boys who are going to have to say, "Whoa, before we offer this, let's make sure we clear this with the FCC. Let's make sure we get an advisory opinion from the FCC as the enforcement bureau." Not the full Commission, the enforcement bureau to make sure this is kosher.

So essentially, as a result of all of this, instead of the Internet working to the benefit of consumers in being developed by technologists, engineers, and innovators, it's going to be lawyers, bureaucrats, and politicians who decide what kind of digital opportunity we're going to have in the twenty-first century.

Senator CRUZ. Thank you.

Mr. PAI. But other than that, it's OK.

Senator CRUZ. Thank you very much.

[Laughter.]

Senator CRUZ. Powerfully said.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Cruz.

Senator Peters is back so I have Senator Peters, Senator Sullivan, Senator Rubio.

STATEMENT OF HON. GARY PETERS,
U.S. SENATOR FROM MICHIGAN

Senator PETERS. Thank you, Mr. Chairman.

And thank you to each of the Commissioners. This has been a very long afternoon for you. And there are a few more questions for you, but I appreciate your service, your public service, and your commitment to these issues that are complicated and, as we are seeing, can be contentious from time-to-time. So thank you for your service.

This is going to go primarily to Commissioner Rosenworcel because of your work in this area. Then I'll ask the Chairman, as well, to comment on this. But there is, without question, tremendous demand for Wi-Fi and devices using unlicensed spectrum right now. And as a result, the upper 5 gigahertz band is being targeted for potential sharing, as you're very well aware, particularly the 75 megahertz and the 5.9 gigahertz band reserved for the use of Intelligent Transportation System, the ITS, including V2V and V2I, which utilize the Dedicated Short-Range Communications service systems.

Those supportive of sharing this band point to the many years of spectrum has been reserved without actually being used. But I think this ignores the millions of dollars that have been invested and thousands of hours spent focused on the technology's development to this point.

The reality is that these connected vehicles are being deployed today in pilot programs on the streets of Ann Arbor, Michigan, for example, and the National Highway Traffic Safety Administration has taken action that will likely lead to a rulemaking of this to require nationwide deployment of vehicles using the V2V during the next few years. And the agency has said that V2V and V2I has the potential, and I think this is incredible, the potential to mitigate or eliminate 80 percent of all accidents that occur right now with the non-impaired drivers.

If we continue to focus on advanced Intelligent Transportation Systems of vehicles and in a smarter infrastructure, we can spur innovation, we're going to build to create jobs, we're going to be able to discover new business models and opportunities that haven't been previously possible, and we can save thousands of lives in the process. So I would contend that we should not do anything here in Congress, or at the FCC for that matter, that would derail this incredible comment.

So Commissioner Rosenworcel, I'd like kind of your thoughts on this. And hopefully, today, you might be willing to commit not to move forward on opening the 5.9 gigahertz band to Wi-Fi until it has been proven that it can be done without any harmful interference to these lifesaving technologies with our vehicles.

Ms. ROSENWORCEL. OK. Thank you, Senator Peters, for the question.

As you undoubtedly know, the demand for our airwaves has grown exponentially over the last decade. And certainly that's true since 1999, when the spectrum was set aside for the kind of Intelligent Transportation Systems you're describing. And I know that the development has been slow but I also know a lot of resources have been poured into that effort.

Since 1999, when that spectrum was set aside, something else has happened. We've grown much, much better at managing interference and allowing for the sharing of services in all sorts of radio spectrum. So it's my hope that we can explore how this could be a shared spectrum for both unlicensed and ITS services, but I take your point that we absolutely cannot sacrifice safety in the process.

Senator PETERS. Well, I appreciate that and your concern to make sure that that's going to be at the top of your list.

Chairman Wheeler, if you'd care to comment as well, certainly your thoughts on it.

Mr. WHEELER. I think Commissioner Rosenworcel is spot on and the future is all about how can you share. And the encouraging thing here is that Intelligent Transportation Systems and Wi-Fi are not that dissimilar. And so, I think that there's a way that, you know, technology can work—I mean, if you're essentially—sending fits the same kind of way, there ought to be a way that you can figure it and that's what we're encouraging.

Senator PETERS. Great. Well, I appreciate that.

Mr. Chairman, I'm going to yield back.

The CHAIRMAN. Thank you, Senator Peters.

Senator Rubio.

STATEMENT OF HON. MARCO RUBIO,
U.S. SENATOR FROM FLORIDA

Senator RUBIO. Thank you.

And I thank you, Senator Sullivan, for yielding your place so that I can make it to my next appointment.

Commissioner O'Rielly, I wanted to begin with you that the use of wireless broadband Internet connected devices has provided all sorts of economic growth and innovation. It was previously, quite frankly, unimaginable. And wireless traffic, as we all know, is projected to grow exponentially in the years ahead. And because of

this, as you may be aware, I introduced legislation to free up additional spectrum for commercial use both licensed and unlicensed.

And I strongly believe that we should be enacting policies that ensure that the United States continues to lead the world in wireless innovation and technology. And unfortunately, it's my personal opinion and I think that of others that the FCC net neutrality order is quite frankly the opposite of what we should be doing. I would be interested to hear you talk a little bit about the impact the Order is going to have on wireless and on wireless consumers who are interested in this topic and may not understand its true impacts on them.

Mr. O'RIELLY. Absolutely. Thank you for your leadership on wireless issues. I would say that I think the Commission has flipped and is backward on how it approaches wireless issues for purposes of judging whether wireless should be treated, you know, as actually offering broadband services; we say no. But for purposes of applying Title II, we say yes. I think it's completely backwards.

Title II application to wireless services, I think; one, is a violation of the statute and I think that is one where we are most exposed in a court proceeding. And I think that the statute fairly clear on that. People have pointed out that 332(c) gets to the question of wireless voice, but wireless data has never been treated as a common carrier service and shouldn't be, in my opinion. It's something that we should celebrate rather than trying to regulate.

So I think it's something that you've been a leader on and I think it's something we should move forward on. And I just think the Commission has it completely backward in what we're trying to do here.

Senator RUBIO. Well, and as you know, I've introduced the Wi-Fi Innovation Act with Senator Booker and I did so because of the growth and potential of Wi-Fi and the need for more unlicensed spectrum from Wi-Fi applications. So I'm pleased the Commission has made additional unlicensed spectrum available on the lower five band, but I'm also hopeful we can make progress in the upper band and that's where our bill is focused.

So my question is: What is the process and timing for bringing that additional bands into use? And I'm concerned that these bands have become mired in all sorts of arguments and stall tactics. So what's your plan to break that logjam and can the FCC use its leadership push the process ahead?

Mr. O'RIELLY. Well thank you for your leadership on your legislation. I don't mean to comment since Senator Peters is no longer here, but I can't make the commitment that he asked for which was that we not move forward on 5 gigahertz. I think it's something that we can move forward.

I've worked with my colleagues on this issue. I think it's something we can do in a short order while still protecting the DSRCs. So we can do both in this band. It's something that's necessary, and I think the Chairman articulated this just a couple moments ago, that they aren't too far apart. And it's something we can do. It has been bogged down in some technical reasons for some interests who aren't interested in sharing their band and I think that's problematic.

Senator RUBIO. And Commissioner Pai, I wanted to ask you, the Internet has, as you know, become an incredible incubator for jobs, growth, freedom under the stewardship of this country, of the United States. In a speech last year, at the Free State Foundation Policy Seminar you said and I wanted to quote accurately, "Public utility regulation would embolden those foreign governments around the world that want to impose greater international regulation upon the Internet."

So, like you, not only am I concerned about the negative impact on investment and innovation here at home by subjecting broadband to these Title II regulations but I'm also very concerned about the message this sends to other governments around the globe who do seek, quite frankly, blatant greater control over Internet governance. We see that in China and Russia and other parts of the world.

In your opinion, what are the international implications, potential international implications of the FCC applying Title II to the Internet?

Mr. PAI. Senator, thank you for the question.

I think the international implications are worrying and that concern was best expressed by the State Department's own Ambassador in 2009 when he said: "That this net neutrality proceeding will be viewed by foreign countries as an excuse to regulate content and infrastructure in a way that might not be consistent with our own policies." And I think, while the technical issues might be, of course, dissimilar, nonetheless the overall message that is sent by adopting Title II regulation to solve a problem that simply doesn't exist is that the FCC, or writ large the U.S. Government, wants to micromanage how the Internet works. And I think it becomes difficult for us to maintain on the international stage, as Ambassador Verveer pointed out 6 years ago, that on one hand we want a free and open Internet when these same repressive foreign regimes can say, "Well, look, you yourself said that the Internet is broken, that competition is insufficient, and that the FCC now is going to stand as the gatekeeper."

Senator RUBIO. So we're sending a mixed message. On the one hand we're arguing that government has no role to play and on the other hand our own government has said there is a problem we need to solve and therefore it has injected itself.

Mr. WHEELER. Senator?

Mr. PAI. I agree.

Senator RUBIO. Yes?

Mr. WHEELER. With due respect, I disagree. And I have met with foreign regulators on this topic. And my message to them is: This is no more regulating the Internet than the First Amendment regulates free speech. This is saying that the Internet is open, that everybody has the right to express themselves.

I met 2 weeks ago with all of the European regulators and they understand this is what it is. I met last week with the head of the International Telecommunications Union, which is kind of the international body that comes up with this. This is not, you need to understand, this is not the regulation of the Internet. This is making sure that the Internet is open.

The regulation of the Internet is the regulation of numbers, names, routers, this kind of activity; and tariffing and rates. "That is not what this country stands for," I said.

When Putin tries to shut down Pussy Riot on Facebook; when China tries to shut down access to Google; when Turkey tries to shut down access to Twitter; those are absolute violations of what we're talking about here. Because no party, whether government or private sector, should act as a gatekeeper to who gets on the Internet. That's what this rule does.

Senator RUBIO. But as you just said at the outset of your statement, you're saying this is no more regulation than the First Amendment. The problem is Putin doesn't have a First Amendment and neither does China.

Mr. WHEELER. No, but——

Senator RUBIO. I understand you're meeting and talking to Europeans, but the ones we're really concerned about is China and Russia and others who already control the Internet because they are not constrained by a First Amendment. And, in fact, don't even understand the concept, in particular, in China of this notion of free speech. And so, when you make the argument to them that the, for example, as you've made now that we're not regulating content, for them it's literally a foreign concept.

They don't have a First Amendment nor do they have any sort of societal and/or governmental commitment to the notion of free speech. What they see is a governmental agency of the United States involved in setting terms for how the Internet can be provided maybe even if it's content neutral. And I think it gives them an excuse to say, "If your government can do it, our government can do it, too." I'm sorry. I wanted——

Mr. WHEELER. With respect, I don't think it sets the rules. And another thing is, when I met with Secretary General Zhao, who is Chinese OK, and said, "You need to understand that's what this is. And in your home country, when you are blocking, that would be a violation of our open Internet rules because that's what this is about. Not the operation of the network but making sure that the—"

Senator RUBIO. And I'm confident that he probably informed you that in his country they set rules, in your country you can set your own rules. He'll remind you of their sovereignty and the notion that their view of what's free speech and what should be allowed is very different than——

Mr. WHEELER. The position of our country hasn't changed.

Mr. PAI. Senator, if I could just add one critical point. Even at a level less profound than matters of free speech and nonetheless is the case, that what we have done is sends the message.

Let me give you one quick example. Under our Internet Conduct Standard, the FCC explicitly tees up practices such as sponsored data as potentially being net neutrality violations. If we were to find that a sponsored data practice, which essentially gives consumers something for free, would violate net neutrality. Now we see foreign countries engaging that same practice. The same people who pushed us to adopt this net neutrality order have called sponsored data every human rights violation.

Now we see foreign countries starting to do the same thing: banning sponsored data and other pro-consumer type innovations that allow some of the smaller competitors to distinguish themselves. So we can't act as if what the FCC does is within a vacuum when it's bad. But the message that it sends when it's good is somehow going to be transmitted through the globe. You can't have it both ways.

The CHAIRMAN. Thank you, Senator Rubio.

Senator Ayotte.

STATEMENT OF HON. KELLY AYOTTE,
U.S. SENATOR FROM NEW HAMPSHIRE

Senator AYOTTE. Thank you, Chairman and Ranking Member. I appreciate it.

Commissioner Pai, shortly after the latest spectrum auction you and I penned an op-ed in *The Wall Street Journal* on the Designated Entity program and the flaws in the program. I think we used and showed a very egregious example in the most recent auction that companies with billions of dollars in revenue were able to get taxpayer credits to purchase discounted spectrum. Since our op-ed, it has been interesting to see that a wide variety of groups have come out to say this issue needs to be addressed by the FCC including groups ranging from the NAACP to Americans for Tax Reform.

Can you update us on this program? I hope that the Commission as a whole will take a very thorough review of what happened because it can't have been what we intended with the so-called "Designated Entity" program. This isn't benefiting truly small or disadvantaged businesses.

Mr. PAI. Thank you, Senator, for the question and for your leadership on this issue.

Since you and I had a chance to collaborate, we have seen, as you pointed out, a broad raising of concern across the country and across the political spectrum about this issue. Senator McCaskill expressed her concerns previously; Representative Pallone on the House side has as well; and aside from the NAACP and Americans for Tax Reform, groups as varied as the NAACP and Citizens Against Government Waste have pointed out that this was not the way it was supposed to work.

Unfortunately, I wish I had a better story to tell with respect to the facts. But since you and I worked together, it's come to my attention that not only were there people who didn't participate in the auction at all, like the gentleman we cited in our op-ed, there are specific companies from Nebraska to Vermont who put in bids but were out-bid either by one or even by both of the Designated Entities, essentially run by Dish, who ultimately were either denied a license and didn't get anything out of the AWS re-auction or who had to have been much more than they wanted to.

And I think part of the problem is that these are facilities-based carriers. These are actual companies providing actual service to actual customers in a lot of these places. And instead, they had to give way to some of this arbitrage that we saw in the auction. And so, that's why currently the FCC is undergoing its standard review of how the AWS re-auction at some point petitions to deny may be

filed by competitors or others who are concerned about it. And I welcome the Chairman's response of Representative Pallone who said that, "we want to make sure that the integrity of the program remains intact, that no one was unjustly enriched." It is important for us to have a further notice of proposed rulemaking where we make sure once and for all that these loopholes are closed and a corporate welfare ends.

Mr. WHEELER. Can I pick up on that, Senator, because we could make news?

Senator AYOTTE. Yes, I would like to.

Mr. WHEELER. Commissioner Pai and I are going to agree.

[Laughter.]

Mr. WHEELER. OK? There are people back here who are falling off their chairs at this moment.

Senator AYOTTE. I'm glad we can agree on this.

Mr. WHEELER. Ditto.

I am against slick lawyers coming in and taking advantage of a program that was designed for a specific audience and a specific purpose. I'm as opposed to that as I was when Commissioner Pai and I disagreed last year on the way the slick lawyers were trying to take advantage of our rules on broadcasting. We are going to fix this. These are rules that have been in place since the Bush Administration.

As the Commissioner said, we've got a rulemaking underway on this. We are going to issue a new public notice on this to make sure that this specific issue is teed up and we are going to make sure that Designated Entities have the opportunity to participate and not to have Designated Entities as beards for people who shouldn't.

Ms. CLYBURN. And Senator, I want you to know that I've been pushing for change in this since 2010. It has been a constant refrain for me to ensure more opportunities in the space. As you know, as was said, we are reviewing those applications. Nothing final has been said. People have an opportunity to weigh in.

Senator AYOTTE. Great. Thank you.

Important issue, but I can't leave without addressing the Commission's recent order. I think it's only in Washington that something as innovative and has driven so much growth and new ideas as the Internet, where we would end up with an order that essentially applies 1930s-style utility regulation and think that that may be the best way going forward to ensure that there's future innovation. I want to share the concerns of many of my colleagues that have been raised about the Commission's order.

And Commissioner O'Rielly, I want to ask you briefly about Europe, because Europe isn't exactly known for its laissez-faire, hands-off regulatory approach. But as I understand the proposals the Europeans are discussing appear to be much less stifling than the FCC's recent rules. Normally we're not looking to them as the model of where we want to be in terms of regulations. But can you help me understand as what I see some recent examples of where, in fact, we could be disadvantaged to some of our foreign competitors?

Mr. O'RIELLY. Yes, Senator. I appreciate that.

I just came back from Barcelona, as a number of my colleagues did. And I had an opportunity to talk to a number of people there,

as my colleagues did. And Europeans particularly notice the decisions that—unlike the Chairman's conversations, my conversations suggest they are very aware of what we did and are willing to exploit it and take advantage of that and say, "If you're going to regulate the network, we're going to go in the opposite direction and we're willing to be less regulatory" and trying to drive traffic to their way, drive companies their way. And then, let the United States suffer in the process, which I think is completely backwards.

Mr. WHEELER. Senator, I met with the European regulators and told them what we had done and what we hadn't done. And I came away with exactly a 180 degrees different. And then I talked to the CEOs of the major international wireless carriers one of whom then was quoted in the press as saying, "Yes, you know, I think that this approach that America is taking is responsible and applicable."

And, you know, what the key thing for all of them was was what we did in terms of so-called "specialized" services, managed services, non-public Internet services, and how we specifically said that isn't going to be covered because the growth in the Internet business—Verizon just had a, their CFO just had a statement about this at our investors conference. The growth in the Internet business is going to be in specific services, Internet of Things over-the-top services that are not public Internet services and are specifically precluded from regulation in this. That was the big thing that the Europeans wanted to talk to me about because they had heard, "Oh, you're going to cover it."

And I said, "No, we're not."

And everybody said, "Oh, OK. Well then, we're pretty copacetic."

Senator AYOTTE. I know my time is up but I'll do a follow-up question because there's a specific example I can think of where, frankly, already Europeans are purposing things that are not as onerous as what was purposed overall by the Commission.

Thank you.

The CHAIRMAN. Thank you, Senator Ayotte.

Senator Klobuchar.

STATEMENT OF HON. AMY KLOBUCHAR,
U.S. SENATOR FROM MINNESOTA

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. We had a Joint Economic Committee hearing with Jason Furman. I was there and then on the floor so it's good to come back.

This week I'm introducing the Improving World Call Quality and Reliability Act with Senator Tester. I know problems with world call completion are of interest to many members of the Commission and I thank you for that.

And also Members of the Committee, I hope you'll consider cosponsoring our bill which is going to directly address one of the root causes of the problem; Least Call Routers. Recently, as you all know, you took enforcement action against Verizon, a major enforcement action for failure to investigate problems with calls not being completed to rural areas. We thank you for that.

Part of the settlement included a commitment to addressing the number of Least Call Routers Verizon uses. I'd like to, again, thank you and particularly Commissioner Clyburn for the continued at-

tention to this issue and this problem which is now 5 years old. We still clearly have problems outside of Verizon.

So I will ask both Chairman Wheeler, Commissioner Clyburn: Least Cost Routers seem to be a major source of these call completion problems. Do we need to know at least who they are and require them to follow minimum quality standards? And do you agree that we need to get to the source of the problem?

And for my colleagues who aren't familiar with this: It is what it sounds. It's actually calls being dropped at businesses and homes for no reason and they're not getting the kind of service that they need. They're getting substandard service. And so, Mr. Chairman?

Mr. WHEELER. So first of all, I think you've pinpointed something very important. The data on that, we will finally start getting first of next month, when the information when carriers are required to file with us. So we'll be able to say to you, with statistical specificity, what, Senator, I believe is the situation that you're attempting to solve. And that you're moving this legislation is terrific and that this is something we are also considering in our further notice on this topic. But I think you've identified that cause célèbre.

Senator KLOBUCHAR. Thank you very much.

Commissioner Clyburn, thank you for your leadership on this issue.

Ms. CLYBURN. I thank you very much.

One of the things that was positive about the Consent Decree that you mention with Verizon is now we're going to have workshops. There's going to be research. In terms of the overall issue, of course, the Chairman mentioned that April first the tension requirements kick in. In August we'll have a clear picture with reports being released.

So I know right now one of the things that you mentioned, the Least Cost Routers, today, you know, the rules don't apply to them today. But, thank you very much for reinforcing an issue that we will continue to review.

Senator KLOBUCHAR. OK, very good.

Thank you, all of you.

Last Congress, I introduced the Smartphone Theft Prevention Act. As we all know, this is an unbelievable problem across the country with these smartphones being stolen and people getting beat up, sometimes killed, over cell phones. And the bill required Smartphone manufacturers and wireless carriers to install kill switches on all their smartphones so that consumers could wipe their information and lock the device if it was stolen.

Following this call to action, the carriers signed a voluntary commitment to have this capability on their devices by this Summer. Additionally, Minnesota and California passed laws to require these consumer protections on all phones sold in their states. We've come a long way on the issue instead sort of pretending it's not happening or that we can't do anything about it. But I think we need to keep on the pressure and that's why I'm actually reintroducing the bill.

Chairman Wheeler, are you committed to keep working with me to address smartphone theft? And do you think there can be more that's done on the national level; and any other Commissioner that wants to chime in?

Mr. WHEELER. Yes. Yes, ma'am.

And thank you for your leadership in coming down to help us kick off the workshop that we had on this. And let me tell you about some of the results of that. Yes, you're right. The kill switch, the voluntary agreement, the kill switch. I've seen reports uncorroborated but in some major cities where theft has gone down as a result of this, we're not supposed to break our—I'm not going to break our arms patting ourselves on the back, but I think there are three things here that are underway. One is that there needs to be a non-wipable, as in you can't wipe it out and substitute something else, unit identifier for each device. Like a vehicle identification number on a car that can't go away.

At our request, the 3GPP, which is a standards body, has said that they will come out with a standard on that by the end of the year. A step forward but we're only moving towards it. It doesn't solve.

Second issue is that there needs to be an on-device remote lock, the ability to wipe this sort of thing. The devices, after July of this year, the devices that come into the market, will have that capability.

The third component that we have to have is we have to have a good stolen phone database. There's currently one run by the JSM Association but it is: well, if you'll participate in this and it's not quite user-friendly and it's not the kind—and we need to work with them or with law enforcement to improve that. And we've been working with law enforcement to bring pressure on either one of those.

But I think those are the three steps that we have to take, but you have clearly been a leader on this and thank you.

Senator KLOBUCHAR. Well, thank you.

Do you want to add anything, Commissioner Rosenworcel?

Ms. ROSENWORCEL. Well, let's see. One in three robberies today involves the theft of a mobile device. And in some major metropolitan areas it's one in two robberies. And by any measure, that's an epidemic. So I think it's vitally important that every consumer have access to the ability to remotely wipe their device and that should be on every device free of cost. And we should make sure that's available as soon as possible.

Senator KLOBUCHAR. All right. Thank you very much.

The CHAIRMAN. Thank you, Senator Klobuchar.

Senator Wicker has returned. So Senator Wicker, Senator Sullivan, Senator Manchin.

STATEMENT OF HON. ROGER F. WICKER, U.S. SENATOR FROM MISSISSIPPI

Senator WICKER. Thank you very much.

[Laughter.]

Senator WICKER. Eight hearings in 5 days? Is that what I've heard?

Mr. WHEELER. Five hearings in 8 days.

Senator WICKER. Only five hearings in 8 days. Well, I've had four hearings in one day. So there you go.

[Laughter.]

Senator WICKER. Breathlessly rushed back in and thank you all for filibustering until I could get here.

Mr. Pai, let me ask you. You know, sometimes we vigorously disagree with our colleagues. It's clear you vigorously disagree with the majority of this panel on the so-called "open Internet rule." And I appreciate you doing it cheerfully but also forcefully. And I want you to help us understand the reasons that you have given procedurally and substantively under this statute as to why this decision is violative of requirements and violative of the Communications Act.

Mr. PAI. Senator, thank you for the question. I could go through all 67 pages but I will abbreviate it for the sake of the panel and for everyone watching.

In short, there are problems with process and problems with substance. In terms of process, my view is the agency failed to comply with the Administrative Procedure Act in terms of giving the public fair notice and an opportunity to comment on the proposal that it ultimately adopted. Here is the indisputable truth. The FCC never purposed Title II. It adopted a proposal in May of 2014 that was based on Section 706. Through the course of the summer, it was widely reported that Section 706 was the lead proposal. Later, it was reported that some sort of hybrid proposal based on the Missoula Initiative was the lead proposal.

Only after the President's announcement on November 10, that Title II was "my plan" and I'm "asking the FCC to implement it," did the FCC suddenly change course.

Senator WICKER. What would need to have been done for the proposal to actually have been made?

Mr. PAI. I would say, and I said this before the President made his announcement when I held the only FCC hearing that allowed people to comment on net neutrality down in College Station, Texas, my view was that whatever the new proposal was, the American people should be allowed to see it and comment on it. We should have a new round of notice and comment. That would avoid the pickle the agency is now in, that it's going to have to litigate for a couple of years whether or not there was sufficient APA notice. But there simply wasn't in this case.

And I think the best evidence of that is the fact that you saw a lot of speculation in the press once we actually got the document on February 5. Well, what's in it? What's not in it? When the changes were made in the lead up to February 26, well what does it mean that broadband subscriber access service was removed? How does that effect interconnection?

None of those details were public and no one knew how to comment on it because they didn't know what was in the plan.

Senator WICKER. Now, with regard to the substance.

Mr. PAI. With respect to substance, I think that both the text of the Communications Act and the FCC's own precedents make it difficult for, if not impossible I would argue, for Title II to be applied to the broadband industry.

I'll just give you one example of that. With respect to mobile broadband, Section 332 explicitly prohibits private mobile service from being classified as a common carrier. And to be sure through the Order, if you've had a chance to read it, you'll see all sorts of

legal gymnastics in which the FCC cleverly tries to redefine the public switch network in order to have it apply to the Internet, to the mobile broadband services. But I don't think a review in court is certainly going to see that that passes muster.

Similarly with respect to wireline Title II, I would argue that there are substantial legal hurdles that the agency is going to have to broach in order to make Title II stick. So both for reasons of process and substance, I think, there are serious litigation risks with this order.

Senator WICKER. Is there any question in your mind that this is going to result in years and years of litigation?

Mr. PAI. The best proof is what has happened in the past. This is the FCC's third bite of the apple. The first two times resulted in unsuccessful challenges at the D.C. Circuit. The first case, which was the Comcast BitTorrent case, took 2 years for us to resolve. The 2010 Open Internet order was only resolved by the D.C. Circuit in 2014.

So the silver lining to this order is that the Communications Bureau will be busy for quite some time trying to figure out which courts to challenge this in and the courts will have a long time to savor its many details.

Senator WICKER. And in terms of protecting the flexibility and the ability going forward of this huge engine of the economy, what does this order do?

Mr. PAI. I think it's going to have a significant negative impact. And the best example of that is mobile data. The argument has been made repeatedly here today that well Title II as applied to mobile has been successful because it has been somewhat diluted, but two points to that. Number one, as my colleague Commissioner O'Rielly pointed out, mobile data has never been a Title II service.

But second, it strains credulity to argue that the tremendous increase in mobile investment has been attributable to Title II application to mobile voice. Obviously, to anyone who is objective looking at this the introduction of the smartphone in 2007 generated an explosion in mobile data usage which carriers then had to struggle to keep up with. And they did that by investing billions of dollars in spectrum and billions more in wireless infrastructure. And it was because mobile data was lightly regulated as an information service that we saw this benefit to consumers.

I would also argue that it's sort of paradoxical to me at least that in January the FCC made a big show about 25-megabits per second being the standard for broadband, but then in February decided that mobile broadband would be subjected to Title II. As my colleague has pointed out, you can't have it both ways. Mobile doesn't count when it comes to this artificially high threshold but it does count when we want to regulate it extensively.

Senator WICKER. Thank you very much.

The CHAIRMAN. Thank you, Senator Wicker.

Senator Sullivan.

STATEMENT OF HON. DAN SULLIVAN,
U.S. SENATOR FROM ALASKA

Senator SULLIVAN. Thank you, Mr. Chairman.

And thank you, Commissioners. I know you have had a long day. And I have a bunch of basic questions. You're the experts. I'm a freshman Senator here trying to figure out what's going on. Obviously, there's a lot of press.

Let me just ask a couple of basic questions. To the extent you can keep them short, but I want to try and get, you know, a number of different responses. FCC reauthorization, when was the last time that happened by Congress?

Mr. WHEELER. I think the Chairman said 25 years ago.

Senator SULLIVAN. So do you think that's a good idea?

Mr. Chairman, Chairman Wheeler, why do you think that's a good idea? Should we do that?

I know the Chairman has said that he thinks it's a good idea.

Mr. WHEELER. I think Congress makes the rules. Congress decided not to for 25 years. If Congress wants to decide to do it again, Congress makes the rules.

Senator SULLIVAN. Commissioner Pai?

Mr. PAI. I think it's a useful exercise because it allows this Congress to modernize our operations and make sure that our rules keep pace with the times. And I think that's important for Congress to be involved with.

Senator SULLIVAN. Let me just follow up on that. So big policy decisions—you're an independent agency—so big policy decisions, who makes those calls? Congress, the President, you? Who is responsible for making big policy decisions that impact telecommunications?

Mr. WHEELER. I didn't know who you were——

Senator SULLIVAN. I'm sorry. I've got so many questions this is——

Mr. WHEELER. Clearly Congress has historically set down the parameters and said this is what we want the agency to do——

Senator SULLIVAN. You think——

Mr. WHEELER.—and to establish an expert agency——

Senator SULLIVAN.—regulating the Internet is a big policy decision that wasn't contemplated 70 years ago that should be more of a congressional action than an independent agency action?

Mr. WHEELER. I think that the Congress instructed us to protect the public interest, convenience, and necessity, and gave specific authorities to do that. And that's what we were following.

Senator SULLIVAN. On a portion of the economy that wasn't contemplated 70 years ago?

Mr. WHEELER. Well, this was 1996 but the early days of the Internet.

Senator SULLIVAN. So, Commissioner Pai?

Mr. PAI. I agree. You know, that's why I said in the wake of the Verizon versus FCC decision in 2014 that now the FCC, now twice having failed in court to have its open Internet rule sustained, we should turn to Congress for guidance.

Senator SULLIVAN. So is there anything in the law, real quickly, that gives the President kind of—so let say Chairman Thune or Ranking Member Nelson go to the Senate floor and they give a big speech on the Internet and how they want it to be controlled, how they want it to be regulated. It's well thought out. And then the President gives a speech too.

Is there anything in the law at all that says, "This agency should give more deference to the President?"

Mr. PAI. Absolutely not.

Mr. WHEELER. Absolutely not.

Senator SULLIVAN. OK.

In terms of consensus, do you try to work consensus as Commissioners? Because there are obviously some pretty differing opinions of this rule. Is that the typical approach to try to work on consensus? Do you think that's important to try to achieve consensus?

Mr. Chairman, a lot of times if you're the Chair you want to work on consensus. Do you think that's important?

Mr. WHEELER. I totally agree. Ninety percent of our decisions are 5–0. The difficult decisions often become contentious. We've had a series of 4–1 decisions.

Senator SULLIVAN. Do you think that decisions like this that are highly contentious, splitting the Commissioners as mentioned, you think it's going to lead to a lot of litigation?

Do you think this decision is going to lead a lot of litigation?

Mr. WHEELER. The big guys have said they're going to sue on this one. They've been saying it from day one.

Senator SULLIVAN. Well, when some of your commissioners think it's illegal action, you think that invites litigation?

Mr. WHEELER. You know, the beauty of it is that you get two lawyers in a room and you'll have three opinions.

Senator SULLIVAN. Well, that's cute but I'm not sure that there's a beauty here at all, to be honest.

Years of litigation are going to create uncertainty. Do you think uncertainty is good for investment in this part of the economy?

Mr. WHEELER. One of the things that——

Senator SULLIVAN. Do you think uncertainty is good for investment in this part of the economy?

Mr. WHEELER. Uncertainty is never good and there are all kinds of uncertainty including what's the Commission going to do. We have set out a certain set of rules. People know what the rules of the road are now, what the yardsticks are. That didn't exist before, and remember that under the 2010 rules, they were not stayed by the court. And so they were in effect for 4 years.

Senator SULLIVAN. Can you give me an example?

Mr. WHEELER. There was great investment during the period when they were in effect.

Senator SULLIVAN. Can you give me an example of regulating a large part of the economy that's resulted in spurring innovation and dramatically increasing economic activity in jobs?

Mr. WHEELER. Look at the period 2010 to 2014 when the previous open Internet rules were in place and we had unprecedented growth.

Senator SULLIVAN. Commissioner Pai, can you respond to that?

Mr. WHEELER. Look at the period—there are other examples too, such as when DSL was regulated under Title II during its greatest period of growth. There is, I mean I think there are track records here that established this kind of growth.

Senator SULLIVAN. Do you have a sense of that?

Mr. PAI. I respectfully disagree with the Chairman. I think that the explosion, in particular, when it comes to wireless investment

was specifically because the 2010 order exempted wireless from the net neutrality rules. And especially one of the reasons why we now live in an increasingly mobile world is because the FCC was relatively restrained in 2010 compared to what it did now.

Time is only going to tell, and I think the best example is Europe where the Europeans have significantly less access to high-speed broadband than we do, 82 percent of Americans only, sorry, 48 percent of Europeans. And when it comes to wireless in particular, the U.S. has 50 percent of the world's 4G LTE subscribers. There's a reason for that. And the reason is because, until February 26, we were relatively restrained and stuck with a bipartisan consensus that has served us so well since the Clinton Administration.

Senator SULLIVAN. Mr. Chairman, I'm out of time. I have additional questions I'd like to submit for the record. Thank you.

The CHAIRMAN. Senator Sullivan, thank you and we'll make sure that those questions get submitted for the record. And since I can't see anybody else coming in——

[Laughter.]

The CHAIRMAN. It's Senator Manchin's turn.

Senator SULLIVAN. You better hit the switch.

The CHAIRMAN. The Chair recognizes the Senator from West Virginia.

STATEMENT OF HON. JOE MANCHIN,
U.S. SENATOR FROM WEST VIRGINIA

Senator MANCHIN. Thank you, Mr. Chairman. I appreciate that so much.

This is such an interesting topic and you know I keep thinking back to those who are old enough or grew up basically before there was mobile phones, cell phones, Internet, computers——

Mr. WHEELER. Television.

[Laughter.]

Senator MANCHIN. I didn't want to go, but we can go there if you want to.

[Laughter.]

Senator MANCHIN. And then, you know, in West Virginia there are still discussions, did Al Gore really invent the Internet or was it something we all contributed to and all of us being involved. I think when you look about where we are, we all will agree. This is an intricate part of our life today and we all depend on it. We might not know all the answers to the questions that we just put forth, but bottom line is we don't want to lose what we have.

In rural states such as West Virginia, they told us that when you divested yourself of the telephone Ma Bell it will be better. Well, it wasn't. They told us also that basically, if we deregulated the airlines, it will be better. It wasn't. Deregulation hasn't, and they said when you deregulate the utilities it'll be better. It wasn't.

So basically, with all that being said, you know in a rural area, rural states, we're a little bit leery of how much better you want to make it for us. So with that, we want to make sure that we still have our access, we're still able to have all of our schools connected in West Virginia. Every school in our state is connected and we made sure of that.

How do we now be able to take that homework to home and still make sure that the child has the ability to do that? I can assure you that there's not enough market in West Virginia for all of our friends on Wall Street or in Silicon Valley to do that. I know that. But I'm still looking for the balance. Somehow we can all—and I understand with the FCC I know you're taking a lot of flak on this but I understand. Basically, I do look at this as a necessity utility to a certain extent. But with that, I know I wouldn't have what I have if the market hadn't been able to do what it did.

So there are some of us on our side of the aisle that is looking for that middle road. Without going to court, can we help alleviate that? Can we do legislation, working with our colleagues on our Republican side, working together as Americans and finding a solution to this without battling it out in a court system and ending up, you know, it's going to be costly no matter what happens. And the consumers end up paying.

So I would say, Mr. Chairman, just coming down or any of you, Mr. O'Rielly maybe since you haven't had lots to say with this, and then finding out—have you all, among yourselves, the five of you, tried to find commonality here that we can work?

Mr. O'RIELLY. So let me suggest an answer to, also to Senator Sullivan's question. The Commission is a creature of Congress. So any time the Congress can speak on something, I think it's helpful for my purposes. So I think that's very helpful. So whatever you are able to agree, in terms of legislation, I think that's helpful. I don't know the particulars but I leave that to your capable hands to whether you can get legislation and what you think the best outcome should be in terms of policy decisions.

Senator MANCHIN. You know, when you look at the GDP of China, China is at 9 trillion; Russia is at 2 trillion; Great Britain is at 2 trillion. We're at 17-plus trillion. So we've done something right in spite of ourself. And we want to make sure that we can continue to grow and Internet has been a big part of that GDP.

You have to give us some direction here. If you five can't find some areas, you know, of agreement or consensus and right now I see you split three-two; pretty evenly split. I think you're all probably good friends. You all talk and work together, but on this you're split. If you can't come together, how in the world do you expect us to work together?

I'm going to skip over you because I'm going to come right back. Right here, I'm going to come—Ms. Clyburn, I will come to you.

Ms. CLYBURN. Miracles do happen.

[Laughter.]

Ms. CLYBURN. I am a believer.

Senator MANCHIN. I think we're on the same wavelength.

Ms. CLYBURN. Well, one of the things that I don't think we could have envisioned just a few months ago is that this body, Congress, you know, recognizes the importance and need for rules for free and open Internet. We are encouragers, enablers, of innovation and investment and that's why this conversation I think is healthy and important. We might not agree on the particulars but we agree on what we think the endgame is; and that is a robust, open, and free platform that will allow every community to be the best it can be.

Senator MANCHIN. It would be accurate for me to evaluate saying that the system that we have right now, the way we're operating the Internet right now, is giving us the access and protection that we need, an average citizen in America, but also allowing the innovators and creators to continue to invest and get a return on that investment. And has it come down that basically that I'm just corporate America, I'm just not getting exactly what I intend for my stockholders to see I'm getting a return on investment so I won't put the money into it because you haven't let unfettered, let me go?

You want to jump in?

Ms. CLYBURN. One of the things that I things that I think is lost——

Senator MANCHIN. I'm sorry, Mr. Chairman.

Ms. CLYBURN.—is some of the—I'm sorry. Will you forgive me?

Senator MANCHIN. I had to wait a long time so maybe he'll give me a couple extra questions.

[Laughter.]

Ms. CLYBURN. He said he would forgive it and——

Senator MANCHIN. Go ahead.

Ms. CLYBURN. Oh, right.

So there are pro-competitive elements of this order that nobody is talking about. When it comes to pole attachments, that has been, you know, in your community, that has been a bottleneck. This order helps us, gives us the tools to enable that type of investment to get rid of the barriers to that. When we talk about our national priorities of connecting America, completing that stool of getting rid—my colleague talks about the Homework Gap. It is important for us to have connectivities and connectivity in our schools and our libraries. But it's just as important that learning does not stop when people get home.

So enabling more people to connect with pole attachments to provide service will hopefully make things more affordable for more people allowing them to connect at home. All of these things are linked. And that's why it's so important for us to continue this conversation. We might not agree on every footnote, which is my internal joke, but we agree on the end.

Senator MANCHIN. I would encourage you all to work together.

Ms. CLYBURN. Thank you.

Senator MANCHIN. I know. You're on.

Mr. PAI. With the Chairman's indulgence, Senator, I would answer that question simply by saying that Title II, I think, takes us away from the direction of getting more broadband options. And one of the most unfortunate things about the net neutrality debate, at least to me and I say this both as a Commissioner and as someone who grew up in rural America far away from any big city, is that there are a number of different FCC policies within our legal authority that we could pursue to give folks in West Virginia and folks in Kansas and folks in South Carolina the same broadband options that people here in Washington take for granted.

We can make it easier, for example, to deploy wireless infrastructure. We could get more 5 gigahertz spectrum out there so that wireless ISPs can deliver high-speed broadband in places like mountainous West Virginia where you can't lay fiber. We can make

it easier to embrace the IP transitions so that these carriers don't have to invest every single dollar in copper but it can deliver fiber to West Virginians. We could modernize the E-Rate program to make it fairer for rural schools who currently don't get a fair shake out of the program to be able to get funding for that program to connect kids with digital opportunities.

Senator MANCHIN. But then you also——

Mr. PAI. These are all things that are fiber——

Senator MANCHIN.—have control of how that's delivered. Correct?

Mr. PAI. I'm sorry?

Senator MANCHIN. There's a possibility of losing control of how it's delivered?

Who is going to make the decision of how I get that?

Mr. PAI. All of us would ultimately set the regulatory framework and the private sector would then have a maximum incentive to do——

Senator MANCHIN. I understand and I'm not objecting to this. I understand where you're coming from and I want the best of both worlds, I guess.

Mr. PAI. Right.

Senator MANCHIN. OK?

I have a pretty good world right now. Can I make it better without throwing the baby out with the bathwater and losing the protections that I've got? I think that's what I'm looking for.

Mr. PAI. Absolutely.

Mr. WHEELER. Senator, I think you raise an excellent point and I have to say that in this hearing room I keep hearing the echo of years ago, sitting at this table, when Senator Hollings was sitting up there in the chair. And he kept saying in his great South Carolina drawl, "I'm a born-again deregulator." Because he learned, as you said, what are the realities when you say the people who run it are the people who are going to make the rules. And what we're trying to say is that this is the most powerful and pervasive platform in the history of the planet. And there ought to be some rules that are made by people other than those who run it.

Senator MANCHIN. Yes, sir.

The CHAIRMAN. And I would say to the Senator from West Virginia that perhaps on this issue we here can find consensus and inspire those five to find consensus.

Mr. WHEELER. Senator, can I pick up on that and say yea and verily?

The CHAIRMAN. Yes. Well, if we can together, though, seriously on a solution, because I think that would make a lot of sense for a lot of reasons.

Senator Wicker has one more question he'd like to ask.

Senator WICKER. One more line of questioning. But Senator Manchin is right; we got it pretty good now. Innovation is pretty good now and I do wonder if this is a solution in search of a problem.

But talking about rural America. Commissioner Clyburn, thank you for visiting Mississippi. Thank you for visiting rural Sunflower County——

Ms. CLYBURN. Yes.

Senator WICKER.—specifically Ruleville in the Mississippi Delta and there you saw a groundbreaking telemedicine program that is treating and attempting to defeat Type II Diabetes. Thank you so much for coming.

This program depends on USF supported robust mobile broadband connections. What is the FCC prepared to do to ensure that sufficient USF support remains available so that rural wireless networks remain up and running enabling access to these critical lifesaving and cost-saving advances in medicine?

Ms. CLYBURN. You know about phase one of our Mobility Fund as well as our Connect America Fund. We are moving ahead in the next phases of that which we will hope will be further enablers for investments. We've got broadband experiments and rural initiatives that will help us work out the kinks for us to go to the next stage of a broader series of investments.

So what we're doing is on a very parallel course, working out the kinks in terms of IP transition and the like and really continuing to fuel innovation and moneys and investments. And working with communities, with the private sector, with government officials to ensure that the monies that are needed to close these gaps to ensure that Ruleville, Mississippi has the connectivity it needs to further the positive health outcomes that I witnessed in that area. Incredible, incredible outcomes.

Senator WICKER. When you were there, did we get you down to Indianola to see the B.B. King Museum?

Ms. CLYBURN. I missed that, unfortunately.

Senator WICKER. We'll have to invite you back. World class——

Ms. CLYBURN. We didn't allocate enough time but if you invite me back I will be glad to. I didn't get a chance to do too much eating. So if you could work on that next time.

[Laughter.]

Senator WICKER. Chairman Wheeler, the University of Mississippi Medical Center and the Delta Council have written you imploring you to preserve Universal Service Support for rural areas. Can the Commission assure rural consumers that there will be no reductions in their access to wireless services? And what assurances can you give this Committee that rural consumers will not lose their current ability to choose among quality providers?

Mr. WHEELER. I think Commissioner Clyburn—thank you, Senator. Can I get an invitation? I'd like to see Lucille.

[Laughter.]

Senator WICKER. Great. Good. Absolutely.

Mr. WHEELER. I think Commissioner Clyburn hit the nail on the head in terms of we are looking at moving to phase two of the Mobility Fund and that it has to fit into all the other activities, which we spoke about earlier in this hearing in terms of what we're doing for Universal Service. You know, we talk about the great job that the University Of Mississippi Medical Center is doing. I'm a huge believer in what mobile health can do.

Before I took this job, I was the Chairman of the UN Foundations in Health Alliance, where it's literally going around the world and saying, "Hey, here's how you can use mobility to solve these problems." And we want to make sure that those kind of opportunities sure do exist in this country.

Senator WICKER. Thank you.

And thank you, my colleagues, for the second round.

The CHAIRMAN. Thank you, Senator Wicker.

Senator Nelson, you want to ask another question too?

We're almost there, guys.

[Laughter.]

Senator NELSON. Not quite.

[Laughter.]

Senator NELSON. Mr. Chairman, I have a letter that the Leadership Conference on Civil and Human Rights, they're weighing in on this. I ask that it be entered in the record.

The CHAIRMAN. Without objection.

[The letter referred to follows:]

THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS
Washington, DC, March 16, 2015

PROTECT AND MODERNIZE THE LIFELINE PROGRAM

Dear Chairman Thune and Ranking Member Nelson:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the rights of all persons in the United States, we urge you to defend the Lifeline program against threats to eliminate it. We also urge you to support the expansion of Lifeline to broadband. The Lifeline program allows our Nation's most vulnerable and chronically underserved communities to maintain telephone service that would otherwise be unaffordable. While critics have focused on alleged fraud and abuse as a reason to eliminate or limit the program, we believe the best approach, as the Committee prepares for its upcoming oversight hearing of the Federal Communications Commission (FCC), is to allow the FCC's strict reforms to continue to address identified abuses, while at the same time assisting the FCC with its plans to update this program for the 21st century.

Lifeline is a successful program, enabling 12 million of our most vulnerable populations to call 911, contact prospective and current employers, and connect with essential health, social, and educational services. Moreover, telephone access for low-income people can save money for other Federal programs, replacing more expensive in-person office visit and simultaneously rooting out fraud in those programs. Because a small household benefit is used in the private marketplace, this program both helps the less fortunate and strengthens competition and jobs.

Although sensationalized and opportunistic attacks on the program have gained traction because they exacerbate and exploit stereotypes about the individuals who use the program, the reality is that the FCC's reforms have successfully addressed fraud and abuse in a comprehensive manner:

- The National Lifeline Accountability Database has eliminated approximately 1.28 million duplicates, which will save the fund approximately $161 million on an annualized basis.
- The FCC's enforcement actions have proposed more than $90 million in fines against companies for violating rules. FCC consent decrees have recovered $600,000 in payments to the U.S. Treasury; and more than $400,000 in repayments to the Universal Service Fund (USF). The FCC has issued citations to more than 300 Lifeline customers with duplicative subscriptions.
- FCC Chairman Wheeler developed a USF strike force to stop fraud and abuse. However, the FY2015 appropriation does not permit full deployment of that effort.

Though successful, Lifeline remains trapped in outdated technology. The FCC recognizes this limitation and is currently developing proposals to improve and modernize the program. We urge you to collaborate with the FCC Chairman and sitting Commissioners as they develop their ideas. For example, Commissioner Rosenworcel has correctly noted that Lifeline expansion is the logical complement to recent E-rate reforms, enabling us to fully address the "homework gap." Commissioner Clyburn's reform principles are consistent with longstanding proposals from the civil rights community:

1. Adopt minimum standards to get the most for every universal service dollar.

2. Protect privacy and make the program more efficient by limiting the role of providers in eligibility verification.
3. Encourage broader provider participation in Lifeline, including possibly expanding participation to community institutions and others.
4. Leverage efficiencies by permitting eligible customers to enroll in Lifeline when they qualify for other benefits programs.
5. Leverage public-private partnerships for outreach and training.

As broadband rapidly replaces voice service as the basic communications tool for our era, the FCC should rapidly update Lifeline to match the times. Broadband nonadoption still hovers at approximately 30 percent of the U.S. population, and is even lower for seniors, Latinos, African-Americans, and recent immigrants. Increasing broadband adoption will improve the economic well-being of those populations as well as the economic competitiveness of our country as a whole.

We urge you to support the modernization of this critical program and to reject the most recent spate of unsubstantiated and outdated attacks. Please contact Leadership Conference Media/Telecommunications Co-Chair Cheryl Leanza, UCC O.C., Inc., at 202–841–6033 or Corrine Yu, Leadership Conference Managing Policy Director, at 202–466–5670, if you would like to discuss the above issues.

Sincerely,

WADE HENDERSON,
President and CEO.

NANCY ZIRKIN,
Executive Vice President.

Senator NELSON. Let's go back. You know this flap started that prompted 4 million comments. I take it that's fairly unprecedented?

Mr. WHEELER. The record.

Senator NELSON. And a lot of that was expressing their angst because they thought that their Internet was going to be messed with. Is that correct?

Mr. WHEELER. Yes, sir.

Senator NELSON. And by messing with it, if we think back to what was in the public's mind at the time, it was: Were they going to have to pay more because certain content was going to have to pay more to get on to the Internet pipes. Is that correct?

Mr. WHEELER. That was one of the major issues, the so-called "fast lane" issue.

Senator NELSON. And by you drawing the Order as you have drawn it, does that allow you, the FCC as a regulator, as referee, along with future regulators, if someone suddenly wants to charge more for certain traffic on the Internet than other types of traffic, that an FCC is going to be a referee there now or in the future to prevent that?

Mr. WHEELER. Yes, sir. We have a flat-out ban on those kinds of paid fast lanes.

Senator NELSON. And that's in the Order?

Mr. WHEELER. Yes, sir.

Senator NELSON. Mr. Pai, do you disagree with that?

Mr. PAI. I agree it's in the Order. But I also agree with——

Senator NELSON. No.

Mr. PAI.—the Chairman last year when he——

Senator NELSON. The obvious question is do you disagree with that provision in the Order?

Mr. PAI. Oh, yes, I do. Absolutely, because, number one, there is no paid prioritization now. There are no fast lanes now. This is an entirely hypothetical concern.

Senator NELSON. OK.

Mr. PAI. And as the Chairman pointed out last year——

Senator NELSON. I'll tell you, Mr. Pai, it wasn't of no concern to 4 million people.

Mr. PAI. Well, you put it well, Senator, when you said they had angst about what was going to happen. If you look at the actual document, there is no evidence in the record of any systemic failure specifically with paid prioritization. Moreover, even if he agreed there was a problem, as the Chairman testified before the House last year, you cannot ban paid prioritization under Title II. And I agree with them.

Mr. WHEELER. Well, you're putting words in my mouth here.

Mr. PAI. I'm quoting you.

Mr. WHEELER. No. Let's be real clear. I said that there is a waiver process under Title II that is a way out of it. What we have done, as you know, is to have a flat-out ban on paid prioritization and to specify what the waiver test ought to be. So if you're going to represent my position, let's be specific on what that is.

Senator NELSON. Let me ask you, Chairman Wheeler, is there a difference in the issue about the application of Title II that is before the court this time that was different the last time that this issue was before the court?

Mr. WHEELER. Yes, sir. I think that the issue——

Senator NELSON. Would you explain that to the Committee?

Mr. WHEELER. The issue before the court in the 2010 rule was the court determined that the kinds of requirements that the Commission had put in place were only requirements that could be applied to a common carrier. And because of the fact that the agency had not said that broadband providers were common carriers, they therefore couldn't reach and impose on them.

A point that is of interest in that lawsuit and is relative to Commissioner Pai has said a moment ago about paid prioritization is that Verizon's counsel during oral argument said: "I have been explicitly authorized by my client to tell the court that the reason we are appealing this decision is that we want the kind of unregulated environment that would allow us to do the kind of things that you've been talking about such as paid prioritization."

It was those issues that were all involved in that decision.

Senator NELSON. Let me give you, Chairman Wheeler, the chance. There was one of the Senators here, I think it was Senator Johnson, that he had asked a question and Commissioner Pai had answered it. You requested an opportunity to respond and there was not time in the Senator's. Do recall?

Mr. WHEELER. You remember that? This is like watching a tennis match, sir. I'm not sure I remember the question.

Mr. PAI. I think that's where you wanted to voice your agreement with what I was saying?

Mr. WHEELER. Was that what it was? No wonder I forgot.

[Laughter.]

Mr. WHEELER. Thank you, though, Senator.

Mr. PAI. Senator, could I just——

Senator NELSON. I've got some additional questions I'll submit for the record——

The CHAIRMAN. Great.

Senator NELSON.—because of the lateness of the hour.

The CHAIRMAN. Do you have a response to this last question?

Mr. PAI. Well, Senator, just to the previous question. I just want to make sure we are absolutely accurate. I am quoting the Chairman on May 20, 2014. "There is nothing in Title II that prohibits paid prioritization."

Mr. WHEELER. So let's quit playing on words.

Mr. PAI. Moreover, the representation of the oral argument was——

Mr. WHEELER. Wait a minute. Wait. Wait. Wait. Wait. Wait.

Mr. PAI.—completely misconstrued.

Mr. WHEELER. Wait. I will stipulate to the fact that I said that. And what that statement says is not how you are interpreting it.

Mr. PAI. You can go to YouTube and watch it.

Mr. WHEELER. Just timeout. Does Title II provide a waiver process?

Mr. PAI. There is no waiver process in Title II. You can interpret the rules to fashion some sort of make——

Mr. WHEELER. There is in all of Title II a process where you can apply to the Commission for a waiver.

Mr. PAI. Under what section?

Mr. WHEELER. And if you don't take that out of context, what I was saying in that hearing was that there is always an opportunity under Title II to come in and seek a waiver under our general procedures.

Mr. PAI. OK. If that's the argument, then obviously with the FCC has general waiver authority to apply it to anything under the sun in order to argue that Title II——

Mr. WHEELER. Boy, well I sure followed up in my explanation of things then, didn't I?

Mr. PAI. I take you at your word then, that you didn't believe that Title II banned paid prioritization. I mean, I think I agree with that and the record speaks for itself.

Senator NELSON. Well, let me just say this——

Mr. WHEELER. We'll use Commissioner Rosenworcel as a referee.

Ms. ROSENWORCEL. It's very fun to sit between the two of these men.

[Laughter.]

Senator BLUMENTHAL. Mr. Chairman, I think that the meetings at the FCC must be very interesting.

Mr. PAI. It's must-watch TV, Senator.

[Laughter.]

Senator NELSON. Let me just say that I have the shared responsibility with the Chairman of this Committee as the majority of this Committee, the Chairman, to see if there's any common ground. And I'm not sure there is common ground if the issues are as divided as they are. And that saddens me because I think that reasonable people can usually come together and find a consensus.

But Commissioner Pai, if the Chairman says, and this has been typical throughout the last 3 hours and 15 minutes, if the Chairman says the sky is blue, you will say, "No, it's a different color."

Mr. PAI. Senator, the best——

Senator NELSON. And that's what has gone on all day.

Mr. PAI. Senator, the best example of my willingness to find consensus is my track record over the two and a half years I've had the privilege of serving as the Commissioner. Under Chairman

Genachowski and Chairwoman Clyburn, we had 89 percent of unanimous votes in terms of meeting items. That percentage has gone down precipitously, down to 50 percent. You will find even on net neutrality, in May 2014, the Chairman's office asked us, "Would you be interested in talking about a possible solution?"

I said, "Yes." They never got back to us.

On this particular issue and a great number of high-profile issues, we consistently have put a proposal on the table to at least allow us to find consensus; not just on net neutrality, incentive auction, E-Rate, you name it.

All of my statements are on the record. You can look at them on my website and they've repeatedly been rebuffed for God knows what reason. But my door is always open. Perhaps my foolish Midwestern optimism, I really believe that we can get to yes because in the first 2 years of my tenure, we did get to yes.

Mr. WHEELER. So since I'm the one who is being impugned here——

Senator NELSON. And you have my permission since this is my time.

Mr. WHEELER. You know, there's a difference between staking out a position and saying this position, which is contrary to the goals of the majority, if you don't agree with this position then you're not compromising with me. But we'll let that slide.

I've heard Commissioner Pai on this. Here's a *Communications Daily* headline "Wheeler is Sitting on NPRM on Redefining MVPD in Hopes of Consensus With Republicans." Here's a statement from Commissioner Pai on our location orders saying, "At the time, I expressed concern the NPRM's proposals would fail to meet that test, and that concern was borne out by the record in this proceeding. So I'm pleased we have adjusted course and are now adopting requirements that meet these two watchwords. I want to commend the parties that worked cooperatively on this effort."

I sit down with all of my colleagues every other week; we have a regular meeting for an hour, on the schedule at least for an hour, to say: "What are the issues? And what do we need to work on?" And I hope that we can continue to produce results that where we respect each other, but we need to be real careful of talking about how redefining things and then saying, "because you won't take my redefinition, you won't compromise," that's not compromise.

Senator NELSON. I'll just conclude by saying that I have a great deal of faith in Senator Thune as a partner as we go forth on a lot of issues on this Committee. And whether or not we can work out something on this, it's to-be-determined. But I can assure you that the conversations between Senator Thune and me are quite civil and in the best spirit of friendliness.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Nelson.

And I think this discussion demonstrates that we do need to figure out how to resolve this issue. And indeed, the ambiguity, I mean the uncertainty; all the discussion that's going on right now suggests to me that we need some clarity. And if we want to ban paid prioritization, let's do it in law. I mean that's a fairly straightforward way of solving this issue and eliminating what will be a lot of uncertainty in a certain, I think, a model lawsuit.

So I look forward to working with you and Members on both sides. I hope we can find that Title X, as you referred to it. The sweet spot.

All right. I assume that the Senators from the Northeast are back because they want to ask some questions. Can you be very, very quick?

Senator BLUMENTHAL. With that suggestion, certainly, Mr. Chairman.

The CHAIRMAN. The Senator from Massachusetts.

Senator BLUMENTHAL. We will seek common ground on brevity. [Laughter.]

The CHAIRMAN. Say that not for my benefit but for theirs.

Senator BLUMENTHAL. I understand. And I want to thank all of you for your patience and your perseverance here today.

I just want to second what my two colleagues have said that what we're certainly going to seek common ground, but I think there is a clear policy that has emerged from the FCC on an open Internet and net neutrality and that policy now, even if it is the result of a divided Commission, is the law. And, if it's challenged as I indicated earlier, I certainly would do everything in my power to support it because I think clarity is to be greatly sought and prized here.

I want to explore another area which relates to a letter that I received from a Connecticut radio station, WGCH, in Greenwich. A local owner of that radio station, Rocco Forte, wrote to me regarding notification he received from Verizon that Verizon Legacy Services provided to the station would be immediately terminated in 90 days and that the station must find alternative service options. And he was upset, understandably, that his other options cost 2.5 times what the station currently pays and also would take weeks to install.

WGCH is a station that serves more than a million people with information that they need and deserve on emergencies, severe weather, catastrophes, and listeners rely on that service. So as IP transition moves forward and more legacy providers go through this process of obtaining permission for the Commission to discontinue existing services in favor of newer technologies and more and more consumers receive these kinds of notices of discontinuance, I want to make sure that there are sufficient protections for consumers.

Mr. Chairman, Chairman Wheeler, I understand the Commission is committed to making sure that consumers are properly informed but I'd also like to know what the Commission is doing to ensure that consumers have recourses and enforceable standards so they're not literally, like WGCH, cutoff from service in the process.

Mr. WHEELER. Yes, sir.

We have just finished the comment period on a rulemaking on this issue. We shorthand call it "Copper Retirement," and there are three principles. The first principles is a public safety principle: you can't negatively effect the ability of people to call 9–1–1. And interestingly enough, when you go to fiber, that becomes a real issue because fiber doesn't have power that comes with it. So how are you going to deal with that in a power outage situation?

Second is that the consumers needs to know what's going on. So there has to be transparency. None of this, "Surprise, we're going to be changing things," which is kind of like, sounds like the story you're talking about.

And third is that small and medium operators like your medium companies like you're talking about, need to continue to have competitive choices. And so, we've teed up all three of those questions in this rulemaking, and we'll be wrestling with bringing them forward in an order. But you've put your finger on a very important issue.

Senator BLUMENTHAL. And what will be the timing for that?

Mr. WHEELER. I hope to be able to work with all of my colleagues to deliver that, you know, sometime around football season, shall we say. I'll give myself a little leeway there.

Senator BLUMENTHAL. Great.

Mr. WHEELER. We take this quite seriously.

Senator BLUMENTHAL. I want to just conclude on the subject that I raised during the end of my last question. It seems to me one of the brightest areas, one of the most promising areas in the video marketplace these days, seems to be the flexibility offered to consumers by online video services. And I'm talking about Netflix, Amazon Prime, AppleTV.

Just yesterday, as you may know, *The Wall Street Journal* reported that Apple is in talks with TV networks to offer a less expensive slimmed down service, a bundle of 25 channels this fall, but here's the comment that struck me and I'm quoting: "For now, the talks don't involve NBCUniversal, owner of the NBC Broadcast Network and cable channels like USA and Bravo, because of a falling-out between Apple and NBCUniversal parent company Comcast Corporation, the people familiar with the matter said."

I'm concerned about competition among broadband providers. I think that concern about anti-competitive behavior is real, as the quote indicated. These companies that offer new services, new competition, require a high-speed Internet access to reach their customers and that risk of anti-competitive behavior is one of the reasons that I've raised concern about the Comcast merger that we've discussed with Time Warner. And, in fact, if I may quote you, you said: "the underpinning of broadband policy today is that competition is the most effective tool for driving innovation, investment, and consumer and economic benefits. Unfortunately, the reality we face today is that as broadband increases competitive choice decreases."

My time has expired, perhaps gratefully in your view, but I just want to invite your comment if you have any other comments or from other members of the Commission, because I think that central principle and goal of competition is so important. I know that you can't comment on the merger, I'm not asking you to, but if you or any of your colleagues has a comment on this general area, I would welcome it.

Mr. WHEELER. Yes, I have opinions. I know that I will surprise you, but I will look down the table to see if anybody—I don't want to hog this. Does anybody want to? Jessica?

Ms. ROSENWORCEL. Sure.

Television is going to change more in the next couple of years than it has over the last several decades. We all now want to watch what we want to watch when we want to watch it on any screen handy. And I think the Commission, going forward, needs to be mindful of all of these new services and help find ways to make them successful so that consumers have more choice and that there's more competition in the provision of video services.

Mr. WHEELER. I have heard from so many of the Members of this Committee about cable pricing and these kinds of things. The answer is in competition. That competition is coming over-the-top. It is coming over-the-top through the Internet. It is one of the reasons why there has to be an open Internet because historically cable systems have chosen who will be on. I will take this service, not that service. And we cannot be in that kind of a situation if we want to have true video competition.

Senator BLUMENTHAL. Thank you.

The CHAIRMAN. Thank you, Senator Blumenthal.

Senator Markey.

Senator MARKEY. Thank you, Mr. Chairman, very much.

May I ask you, Mr. Chairman, did the FCC follow the processes used by both Democratic and Republican Commissions when crafting these latest net neutrality rules?

Mr. WHEELER. Yes, sir.

Senator MARKEY. Hmm. These are tough decisions. So it's a process, though. And out of the process came a decision that I agree with. I think it's an historically correct decision but I don't think there should be a question about whether or not you use the process that allowed all voices to be heard. And the final vote, three to two, three to two is based upon the totality of everything that all five of you had the opportunity to hear. Three to two. But the process gave everyone the ability to be able to hear what they needed to hear.

OK? And I think you made just the right decision. And I think you made the right decision looking at the whole history of the FCC, and what you've done for our country. Back in the 1970s, you know, the CEO of Sprint and MCI came into my office and they had less than one-half of one-half of one-half of 1 percent of the market. And they wanted the FCC to change the rules so you didn't have to dial 23 numbers before you dialed the number your mother made you memorize in case you're ever in a car accident.

[Laughter.]

Senator MARKEY. And that's what created those industries. The FCC is saying, "No, competition." You know the FCC passed the rules and said, "No, a cable company doesn't have to put up a separate pole down these streets. You can use the telephone pole and pay a reasonable fee to do so. We don't want the whole street filled up with just poles, huh?"

It was reasonable. It added to the competition. AT&T didn't want to be broken up, you know, but we all had black rotary dial phones. You can't just stay there forever. We're already a hundred years into that era at that point. Got to move on. It's all about competition. It's all about innovation.

When you did the light touch on wireless, 1993, the FCC using Title II was all intended on unleashing hundred and hundreds of

billions of dollars of new investment. It worked. The FCC made the right decision. You're the agency of expertise.

When we created the third, fourth, fifth, sixth, seventh cell phone license, the reason we had to do it was the first two companies had monopolies charging 50 cents a minute and the phone was the size of a brick and nobody had one. That's 1993. That's 1994. People have two devices in their pockets, but the FCC made the right decision to advance competition. That's what this is all about.

The cable industry did not want AT&T and the telephone companies to get into cable. They wanted the monopoly. AT&T did not want the cable industry to be able to find telephone service. Right? They all fought. These are big players here. Big players, and I understand it. Big players don't want little people coming in ruining this nice little world that they have going.

And even the decision you just made on municipal broadbands, that's just saying to individual communities all across the country, you can't provide competition. And that's a three to two decision here. Three to two, three to two, three to two. I understand. I understand the Commissioners that vote no. These are tough issues. There were tough issues on allowing MCI and Sprint to be born back in the 1970s. Tough decisions because you're taking on the monopolies, you're taking on the big companies.

So we're at crossroads here where the innovation, the investment dollars, the creativity, the content creators are not the big companies, they're thousands of little companies that all benefit from net neutrality. You got it just right. It's the heart of our economy. It's where young people want to go, of all races. It's where the venture capitalists are putting their money.

And as you correctly pointed out, all these companies then reported within days after you passed this rule that it wasn't going to effect their long-term investment in their infrastructure going forward. They all said the exact same thing. But you know what else happened? All over the country, a whole bunch of people between the ages of 20 and 35 all said, "This is great. I got new apps; I got new technologies; I have new services; I have new stuff. I can now reach 310 million Americans."

And as soon we do that in America and come up with the idea, then we're selling it across the world branded "Made In America." It's these new companies that make the difference. And just like Sprint and MCI all the way through today, that's what the FCC is all about. And you're the agency of expertise and you've used this existing framework brilliantly over the years. Brilliantly.

And I think you got it right again. And I think it would be ill-advised for the Congress to move in and try to be the agency of expertise when there is now a consensus that it's already been built by the statements of the largest companies that they can live with it; that they'll invest at the same pace but the enthusiasm that comes from these smaller software apps companies, the new Internet startups has just been overwhelming.

So I just say this to put in context the whole history of how far we've come in a brief period of time. You don't have to, when a long distance phone call comes into your house, any longer yell, "Hurry, hurry. It's a long distance call."

AT&T had charged two bucks a minute for a hundred years because they could get away with it. OK? And what we're doing here is we are not letting people get away with saying, "No." There's another way of doing business. That's what net neutrality under Title II makes possible for our country.

And I thank you so much for your good——

The CHAIRMAN. I thank the Senator from Massachusetts. I assume there wasn't a question in there.

[Laughter.]

Senator MARKEY. There was and, in fact, the first question was to the Commissioner, and he answered.

The CHAIRMAN. That's OK. You don't have to ask.

[Laughter.]

Senator MARKEY. It was the leading question but it was a question.

The CHAIRMAN. And mark the Senator from Massachusetts down as undecided on our draft bill.

[Laughter.]

The CHAIRMAN. I want to, just in terms of FCC reauthorization, very quickly, it got asked once before and a couple of you responded to it, but I want to ask the question of all the Commissioners. Is that something you think we ought to do? Is it time to reauthorize the FCC?

Mr. WHEELER. That's a decision that you make. The Congress has made the decision not to thus far. If you want to change that decision, you're the Congress you make the rules.

Ms. ROSENWORCEL. I agree. That's up to Congress, but I also agree that it's always good to review Federal agencies and practices.

Mr. PAI. Yes.

Mr. O'RIELLY. It's Congress's decision but I do agree. It's time to move forward with something.

Ms. CLYBURN. I yield to the expert body.

Senator MARKEY. Mr. Chairman, can I say? Twenty-five years is a long time.

The CHAIRMAN. It is.

Your hair was a different color back then.

[Laughter.]

The CHAIRMAN. And very quickly, one reform that you would recommend that we make, or a top reform, as you think about FCC reauthorization? Any come to mind?

Mr. O'RIELLY. I have put a number on the table already and talked about them in my statement. But one that I haven't talked about that I think there's a need to have an accountability of our enforcement procedures. We issue a number of NALs and in judgments in that case, but there's no actual tracking of what actually happens to the money. Are we actually getting the money that we're actually, you know, assigning penalties for, and I think that that will be very helpful. I tried to get the material for this hearing and the information just came back, well, we don't track that. I just think there's something wrong.

We should know that if we're penalizing somebody is it actually being paid, you know, what is the ramifications for this? So that's

one thing I would add to the multiple layers I've already talked about.

Ms. CLYBURN. And I have been talking about this for a number of years. But Sunshine Act Reform, it makes our deliberative process a bit cumbersome particularly as it relates to the joint board and conference. And so, Sunshine Act reform would be top of my list.

Mr. PAI. I will say in addition to the proposals in the Process Reform Act and Consolidated Reporting Act, I would add reform of Section 5 of the Communications Act to ensure that the full commission has an opportunity to weigh in on serious and substantial policy questions, which current are often resolved on delegated authority by the bureaus.

Ms. ROSENWORCEL. I think we need a program to bring in more engineers. We have more wireless technologies evolving faster than at any point in human history. And I think that if we were able to bring in more engineers to review some of those new technologies and equipment authorizations, which are multiplying, we would be a lot faster at making sure that innovation makes its way to the marketplace.

Mr. WHEELER. I think this is a series of good ideas and I'd like to be much more forthcoming and more detailed in a response with a laundry list, sir.

The CHAIRMAN. Okay. All right.

Well, look, it has been a long day. I appreciate your indulgence. I would just say, in closing, I think the issues that we've discussed and debated today, you can tell there are strong feelings about. I still believe, maintained for a long time, that we're better served in the long run if we can provide clear rules for the road. And I think clear direction of the FCC but limited, tailored, to me, is a better way to approach the issue of how best to achieve an open Internet. And, as I mentioned before, we've got a bill with Senator Nelson and others on the Committee about it.

I would hope, going forward, that the Commission could play a constructive role, not discourage us from legislating but perhaps be helpful if we decide to do something that would put something in statute that I think, again, addresses the issue of uncertainty and lawsuits which is going to plague, I think, this order for some time to come, that you all could play a contributing role to that and not work against that.

Mr. WHEELER. Can I just be supportive of those comments, sir? I think we're in a situation of we will, we will provide you whatever expertise that we can including from different points of view. And this is going to be a classic situation of we'll report and you decide.

The CHAIRMAN. OK.

Senator NELSON. And I've asked that question as well of the Chairman. And he has assured me that he will. My sense is, as a result of what we've heard today from the five commissioners, is that we're going to have to let this percolate a bit before we can actually sit down and have this consensus-building that you and I are talking about.

The CHAIRMAN. OK.

With that, the hearing record will remain open for two weeks, during which time the Senators are asked to submit any questions

for the record. Upon receipt, the witnesses are requested to submit their written answers to the Committee as soon as possible.

I thank the panel. This hearing is adjourned.

[Whereupon, at 6:10 p.m., the hearing was adjourned.]

APPENDIX

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What Are the Bounds of the FCC's Authority over Broadband Service Providers?—A Review of the Recent Case Law

By Lawrence J. Spiwak

The Federal Communications Commission (FCC) has a long and distinguished history of applying a light regulatory touch to nascent technologies that can, and often do, disrupt the status quo (*see, e.g.*, the FCC's successful *Competitive Carrier* paradigm for long distance service).[1] Consistent with this precedent, as the Internet began to emerge as an alternative platform to traditional telecommunications services, the agency again had the foresight to apply a light regulatory touch.

What is interesting to note is the FCC's choice of legal theories under which it decided to pursue its deregulatory strategy for broadband. The Telecommunications Act of 1996 offered the FCC two broad paths.[2]

First, the FCC could have tried to regulate broadband Internet access using a "light touch" form of Title II common carrier-style regulation by using

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Lawrence J. Spiwak *is the president of the Phoenix Center for Advanced Legal & Economic Public Policy Studies, a non-profit 501(c)(3) research organization that studies broad public policy issues related to governance, social and economic conditions, with a particular emphasis on the law and economics of the digital age. Mr. Spiwak can be reached at* lspiwak@phoenix-center.org. *For more information, visit* http://www.phoenix-center.org.

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What Are the Bounds from page 1

its authority under Section 10 of the 1996 Act to forbear from select portions of the Communications Act.[3] While this approach was contemplated over the years, both Democrat and Republican administrations soundly rejected this path. As the Clinton-era FCC observed in 1998, "classifying Internet access services as telecommunications services could have significant consequences for the global development of the Internet. We recognize the unique qualities of the Internet, and do not presume that legacy regulatory frameworks are appropriately applied to it."[4] Indeed, there are several fundamental legal and policy problems with such a "Title II Lite" approach: For example, as the FCC noted, this approach would foist a host of legacy regulations designed for a monopoly telephone world (including state regulation) immediately upon the Internet—a policy which on its face makes little sense, not to mention its inconsistency with FCC precedent of applying *de minimis* regulation on nascent technologies.[5]

Second, the agency's use of its Section 10 forbearance authority has a sordid past, and the agency's latest theory of forbearance—set forth in its *Phoenix Forbearance Order*—effectively neuters Section 10 as a plausible deregulatory tool.[6] Indeed, because the Commission has described each BSP as a "terminating monopoly" over access to their respective customers, Commission precedent makes it difficult for the agency to forbear from mandatory tariffing requirements and other common carrier obligations should it choose to reclassify broadband internet access as a Title II common carrier service.[7] Thus, for such a "light touch" common carrier approach to work effectively, the FCC must maintain a sufficient level of credibility for "regulatory self-restraint" with both the industry and financial markets to preserve investment incentives—a credibility which is tenuous at best.[8]

Instead, the FCC classified broadband Internet access as an "information service"[9] under Title I and decided to impose regulation (as necessary) under its long-standing "ancillary authority."[10] Not only did such an approach avoid applying legacy regulations to the Internet, but had the added benefit of effectively preempting state public utility commissions from regulating broadband.[11] The FCC eventually classified everything from cable broadband,[12] wireline broadband,[13] wireless broadband[14] and even broadband over powerline[15] as a Title I information service. The FCC's deregulatory approach is credited with the rapid pace of deployment, adoption, and innovation in the broadband ecosystem.[16]

CONCERNS ABOUT THE CURRENT LEGAL REGIME

Notwithstanding the benefits of the agency's deregulatory approach for broadband, some parties are concerned that the current legal regime fails to provide the FCC with sufficient authority over broadband Internet services to protect consumers[17] and, as such, the FCC should solidify its authority by reclassifying broadband Internet service as a Title II common carrier telecommunications service.[18] Given the FCC's current efforts to move forward with the IP Transition[19] and with its new attempt to draft legally-sustainable *Open Internet Rules*,[20] questions regarding the strength of the agency's authority under alternative legal approaches, as well as a search for the boundaries of the agency's authority, have returned to the forefront of the debate.[21]

In an effort to provide some illumination to this important question, this article reviews three recent cases from the DC Circuit—*Comcast v. FCC*,[22] *Cellco Partnership v. FCC*[23] and *Verizon v. FCC*[24]—to evaluate the current state of the law. After review, these cases indicate that the FCC has ample authority over Broadband Service Providers (BSPs) going forward under the current legal regime and, as such, reclassification of broadband Internet access as a Title II common carrier telecommunications service is unwarranted. In particular, this analysis reveals the following:

1. Where applicable, these cases hold that BSPs are still subject to direct jurisdiction under certain sections of Title II (telephone service), Title III (wireless service) and Title VI (cable service) of the Communications Act; hence, the FCC's decision to classify broadband Internet access as a Title I information service does not *a fortiori* mean that the FCC has abdicated its oversight of BSPs altogether. To the contrary, to the extent BSPs continue to engage in activities that fall

within the agency's direct subject matter jurisdiction, the FCC's ability to carry out its traditional core mandate (*e.g.*, spectrum allocation, consumer protection, public safety, universal service, etc.) remains very much intact.[25]

2. These cases hold that the FCC's ancillary jurisdiction over BSPs remains alive and well, provided that the FCC ties the use of that jurisdiction to a specific delegation of authority under Title II, Title III, or Title VI. In this sense, nothing has changed. So, while ancillary authority remains a potent and legally-sound tool in the FCC's regulatory arsenal to remedy policy-relevant harms, especially on a case-by-case basis, the agency must provide its whys-and-wherefores to the court.
3. With the DC Circuit's ruling in *Verizon*, the FCC now has an *additional hook for ancillary authority* under Section 706 to regulate BSPs, subject to two important limitations: (1) just as the FCC's use of its traditional ancillary authority, in order to invoke Section 706 the FCC must tie its actions back to a specific delegation of authority in Title II, Title III, or Title VI; and (2) the FCC also must demonstrate that any use of Section 706 is designed to promote infrastructure investment and deployment on a reasonable and timely basis. As shown below, these limitations can be meaningful. For example, because the FCC must tie its invocation of Section 706 to a specific delegation of authority, this requirement probably prevents the FCC from extending regulation to stand-alone edge providers who are not otherwise engaged in jurisdictional activities as some fear. Similarly, because the FCC must tie its use of Section 706 to a specific delegation of authority in the Communications Act, Section 706 probably does not expand the FCC's authority to preempt state laws restricting municipal broadband deployment.
4. These cases make clear that although the FCC retains jurisdiction over BSPs, the nature of the type of regulation it may impose has changed. That is to say, because the FCC classified broadband Internet access as a Title I information service, the FCC is prohibited by statute from imposing traditional Title II common carrier obligations on BSPs.[26] Specifically, the agency may not regulate broadband Internet access using the traditional "unjust and unreasonable" or "undue discrimination" standards of Title II.[27] However, these cases also hold that the FCC may regulate the conduct of BSPs under a "commercially reasonable" standard, which, the courts reasoned, permits individualized transactions and is thus sufficiently different from common carrier regulation to be lawful. Thus, in a way, the FCC's regulatory authority over BSPs actually may be *broader* than what it previously had under the traditional Title II common carrier regime. That being stated, as the D.C. Circuit noted in *Verizon*, evaluation of any new "commercially reasonable" standard will be contingent on "*how* the common carrier reasonableness standard applies in … context, not *whether* the standard is actually the same as the common carrier standard."[28]

THE CASE LAW

This section evaluates the current state of the law regarding the FCC's authority over BSPs, by reviewing three recent cases from the DC Circuit: (1) *Comcast v. FCC*, (2) *Cellco Partnership v. FCC*, and (3) *Verizon v. FCC*. The intention is to provide a review of the current law and to avoid any commentary about how or when the FCC should exercise this authority.

COMCAST V. FCC

In *Comcast*, the DC Circuit was confronted with the FCC's first formal attempt to address the network management practices of BSPs,[29] an effort for which the FCC conceded it lacked any express jurisdiction to do.[30] As such, the central legal issue in *Comcast* revolved around the question of whether the FCC could exercise its ancillary jurisdiction to regulate such practices.[31] At bottom, while the court answered this question in the affirmative, it found that in this particular case the agency had failed to provide an adequate justification to warrant the exercise of its ancillary jurisdiction.

In its analysis of the law, the court looked at two types of statutes on which the FCC relied: (1) statements of Congressional policy; and (2) statutory provisions that purport to provide a grant of direct

responsibility. Let's look at how the court viewed each category under the particular facts of this case below.

Statements of Congressional Policy

As many pieces of legislation, the Communications Act is replete with Congressional statements of policy expressing this desire or another.[32] In this particular case, however, the court focused on the FCC's use of policy statements contained in Section 230(b)[33] and Section 1 of the Communications Act.[34] According to the DC Circuit, however, "policy statements alone cannot provide the basis for the Commission's exercise of ancillary authority" because such "authority derives from the 'axiomatic' principle that 'administrative agencies may [act] only pursuant to authority delegated to them by Congress.'" As the court observed,

> Policy statements are just that—statements of policy. They are not delegations of authority. To be sure, statements of congressional policy can help delineate the contours of statutory authority. *** *[So, while] policy statements may illuminate [the FCC's] authority, it is Title II, Title III, or Title VI to which the authority must be ancillary.*[35] (Emphasis supplied.)

In fact, reasoned the court, not only was the FCC's use of policy statements inconsistent with Supreme Court precedent, "but, if accepted it would virtually free the FCC from its Congressional tether."[36] Ancillary authority, the court reiterated, must be tied to a specific delegation of authority in Title II, Title III, or Title VI.

Specific Delegations of Authority

As noted in the preceding discussion, the court announced that it was amenable to arguments that the FCC could exercise ancillary jurisdiction over BSPs, so long as the FCC articulates a clear nexus to a specific grant of authority found somewhere in Titles II, III, or VI of the Communications Act. In this particular case, because of both substantive and procedural infirmities, the court ruled that the FCC did not meet this requirement. The following describes three examples of such infirmities:

1. The FCC opened its argument by citing Section 706 as potential authority. However, because at the time of this decision the FCC still held that Section 706 did not provide it with an independent grant of authority, the court rejected this argument.[37]
2. The FCC also relied on Section 256, which directs the FCC to "establish procedures for … oversight of coordinated network planning … for the effective and efficient interconnection of public telecommunications networks."[38] However, because the court noted that Section 256 goes on to state that "[n]othing in this section shall be construed as expanding … any authority that the FCC" otherwise has under law"—which, in the court's view, was "precisely what the FCC attempted to do" in this case—the court similarly rejected the FCC's argument.[39]
3. The court rejected the agency's attempt to use Section 257, which directs the FCC to issue a report every three years identifying barriers to entry for entrepreneurs and small businesses in the provision and ownership of telecommunications and information services.[40] While the court found that it could "readily accept that certain assertions of Commission authority [to] be 'reasonably ancillary' to the Commission's statutory responsibility to issue a report to Congress"—for example, the court recognized that it would be permissible for the agency to impose disclosure requirements on BSPs in order to gather data needed for such a report—it also found that "the FCC's attempt to dictate the operation of an otherwise unregulated service based on nothing more than its obligation to issue a report defies any plausible notion of 'ancillariness.'"[41]

Case Summary

So, what does *Comcast* tell us? At minimum, to paraphrase Mark Twain, the reports of the demise of the FCC's ancillary authority are "greatly exaggerated." To the contrary, a plausible reading of *Comcast* (a reading that is reinforced by the dicta contained in the two cases described below) indicates that the FCC's ancillary authority is alive and well, subject to two clear limiting conditions: First, the FCC may not assert its ancillary authority by simply relying on statements of Congressional policy; and second, the FCC must tie the exercise of its ancillary jurisdiction to a specific delegation of authority contained in Title II, Title III, or Title VI[42] (a holding that is a well-established criterion of ancillary jurisdiction).[43] What

Comcast did not do, however, is address the question of what are the exact boundaries of that ancillary authority vis-à-vis the imposition of common carrier obligations on Title I services. We turn to that question next.

CELLCO PARTNERSHIP V. FCC

In *Cellco*, the DC Circuit was tasked with evaluating the legality of the FCC's *Data Roaming Order*, under which the agency mandated mobile providers to offer data roaming agreements to other such providers on "commercially reasonable" terms.[44] While the FCC's authority for its earlier efforts to impose roaming for voice services was relatively clear under Title II,[45] the *Data Roaming Order* pushed the legal envelope because not only had the FCC specifically classified mobile broadband as an "information service" under Title I, but under the plain terms of Section 332(c)(2) of the Communications Act, "a person engaged in the provision of a service that is a private mobile service *shall not*, insofar as such person is engaged, *be treated as a common carrier for any purpose under this Act*."[46] Accordingly, the court in *Cellco* was forced to resolve two legal questions: (1) did the FCC have the legal authority to issue the *Data Roaming Order* in the first instance?; and, if so, (2) did the agency unlawfully treat mobile providers as "common carriers" in this particular case? How the court resolved each question is discussed below.

Jurisdiction

In support of its action, the FCC identified three sources of regulatory authority for its *Data Roaming Order*: (1) Title III of the Communications Act, which broadly governs the FCC's authority over radio spectrum; (2) Section 706 of the Telecommunications Act of 1996; and (3) the FCC's ancillary authority under Title I. According to the court, however, in this particular case "we begin—and end—with Title III."[47]

In particular, the court focused on the agency's use of Section 303(b), which authorizes the agency to "'[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class'"[48]; and Section 303(r), which empowers the FCC, subject to the demands of the public interest, to "'[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter.'"[49] While the appellants argued that the FCC's use of these sections represented "an unprecedented and unbounded theory of regulatory power over wireless Internet service under its general 'public interest' authority", the court disagreed.

First, the court noted that while Title III does not "confer an unlimited power," it does endow the FCC with "expansive powers" and a "comprehensive mandate to 'encourage the larger and more effective use of radio in the public interest.'"[50] So, while the court held that the FCC may not rely on Title III's public-interest provisions without mooring its action to a distinct grant of authority in that Title (a finding consistent with the holding in *Comcast*), in this particular case the court found that the agency's reliance on Section 303(b) was a sufficient delegation of direct authority.

According to the court, Section 303(b) directs the FCC, consistent with the public interest, to "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class." In the court's view, that is "exactly what the [*Data Roaming Order*] does—it lays down a rule about 'the nature of the service to be rendered' by entities licensed to provide mobile-data service." The appellants countered by arguing that the *Data Roaming Order* exceeded the bounds of Section 303(b) because instead of merely prescribing the nature of a service, the *Order* mandated the provision of service. Again, the court disagreed. In the court's view, wireless carriers are perfectly free to "choose not to provide mobile-internet service." As such, reasoned the court, the *Data Roaming Order* "merely defines the form mobile-internet service must take for those who seek a license to offer it."[51]

Next, the court took on the appellant's argument that the *Data Roaming Order* impermissibly resulted in a "fundamental change"—rather than a mere modification—of its existing licenses under Section 316 of the Communications Act.[52] While the court agreed that the FCC's Section 316 power to "modif[y] existing licenses does not enable it to fundamentally change those licenses," in the court's view, the *Data Roaming Order* "cannot be said to have wrought such a 'fundamental change.'" According to the court, because the *Data Roaming Order* "requires nothing more than the offering of 'commercially reasonable' roaming agreements, it hardly effects such a radical

change." Indeed, reasoned the court, "imposing a limited obligation to offer data-roaming agreements to other mobile-data providers 'can reasonably be considered [a] modification [ ] of existing licenses.' "[53]

Common Carriage

Having ruled that Title III authorized the FCC to promulgate the *Data Roaming Order,* the court next turned to the other central legal question of the case—did the *Data Roaming Order* contravene the Communications Act's prohibition against treating providers of mobile data service as common carriers?[54]

The Communications Act defines "common carrier" as "any person engaged as a common carrier for hire"[55]—a definition which the court found to be "unsatisfyingly circular."[56] Complicating matters, reasoned the court, was the fact that "over the years … the Commission has relaxed the duties of common carriers in certain respects, and the line between common carriers and private carriers, *i.e.*, entities that are not common carriers, has blurred."[57] Accordingly, the difficult task before the court was "to pin down the essence of common carriage in the midst of changing technology and the evolving regulatory landscape."[58]

As a first step, the court reviewed the relevant case law and discerned the following three "basic principles" to guide its analysis to determine whether a BSP is acting as a "common carrier." They are as follows:

> Principle No. 1—If a carrier is forced to offer service indiscriminately and on general terms, then that carrier is being relegated to common carrier status.
> Principle No. 2—The FCC has significant latitude to determine the bounds of common carriage in particular cases.
> Principle No. 3—There is an important distinction between the question of whether a given regulatory regime is *consistent* with common carrier status and the question of whether that regime *necessarily confers* common carrier status. (Emphasis in original.)[59]

While Principles Nos. 1 and 2 are rather straightforward and reflect years of administrative law precedent, it is Principle No. 3 which is the interesting holding of law. According to the court,

> … even if a regulatory regime is not so distinct from common carriage as to render it inconsistent with common carrier status, that hardly means it is so fundamentally common carriage as to render it inconsistent with private carrier status. In other words, common carriage is not all or nothing—there is a gray area in which although a given regulation might be applied to common carriers, the obligations imposed are not common carriage *per se*. It is in this realm—the space between *per se* common carriage and *per se* private carriage—that the FCC's determination that a regulation does or does not confer common carrier status warrants deference. Such is the case with the data roaming rule.[60]

Having derived these principles—and, in particular, having identified a permissible "gray area"—the court then used these principles to evaluate whether the *Data Roaming Order* improperly imposed common carriage requirements. After review, the court found that it did not.

In particular, the court focused on the fact that the *Data Roaming Order* provided substantial room for individualized bargaining and discrimination in terms by expressly permitting providers to adapt roaming agreements to "individualized circumstances without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms." Given the FCC's phraseology, reasoned the court, the *Data Roaming Order* does "not amount to a duty to hold out facilities *indifferently* for public use." (Emphasis in original.) Moreover, reasoned the court, while the *Data Roaming Order* requires carriers to offer terms that are "commercially reasonable," the *Data Roaming Order* imposes no presumption of "reasonableness" (in contrast to the traditional "just and reasonable" standard under Title II); instead, the FCC will evaluate commercial reasonableness via 16 different subjective factors plus a catch-all "other special or extenuating circumstances" factor. According to the court, because the *Order* provides "considerable flexibility for providers to respond to the competitive forces at play in the mobile-data market" via commercial negotiation, the *Data Roaming Order* does not contravene the statutory exclusion of mobile providers who provide data service from common carrier status.[61]

Case Summary

After review, there are several interesting aspects of *Cellco* which merit further discussion. First, notwithstanding its holding in *Comcast* affirming the validity of the FCC's ancillary authority, it is interesting to note that the court in *Cellco* went out of its way to find a direct delegation of authority in this case, *i.e.*, although mobile broadband is classified as a Title I service, the court permitted the FCC to regulate the service under Title III. In so doing, *Cellco* tells us that the FCC's decision to reclassify broadband Internet access as a Title I service does not *a fortiori* mean that the FCC abdicated its general jurisdiction altogether.[62] To the contrary, to the extent that Broadband Service Providers engage in some sort of activity governed by Title II, Title III, or Title VI, *Cellco* is a plain reminder that the FCC's plenary jurisdiction over BSPs remains very much in force. As such, *Cellco* can be read for the proposition that the FCC's ability to carry out its traditional core mandate (*e.g.*, spectrum allocation, consumer protection, public safety, universal service, etc.) remains very much intact.[63]

The court also identified a permissible "gray area" where the FCC, subject to some limitations, may impose regulations that resemble—but are not *per se*—common carriage obligations on BSPs. So, while the FCC may not use the traditional "just and reasonable"[64] or "undue discrimination"[65] standards contained in Title II to regulate BSPs, *Cellco* holds that the agency may use a "commercially reasonable" standard to do so. The holding sends a clear signal that while the FCC cannot impose formal Title II price regulation on Title I BSPs, the agency retains the authority to impose *de facto* rate regulation, albeit under a "softer" standard that permits some individualization of terms and conditions across transactions.

VERIZON V. FCC

In the last case of the trilogy, the DC Circuit in *Verizon* was again tasked with determining whether the FCC could impose "net neutrality" regulations on BSPs.[66] This case makes two significant holdings of law. First, *Verizon* was the first case in which a court affirmatively held that Section 706 provided the FCC with an independent source of regulatory authority over BSPs (albeit subject to several limitations).[67] Second, notwithstanding this newfound independent authority, the court reaffirmed the principle that because the agency made the affirmative decision to classify broadband Internet access as an "information service" under Title I, it is bound by its prior policy choices—that is, having classified broadband Internet access as an "information service" under Title I, the Communications Act expressly prohibits the imposition of traditional common carriage regulation upon such services.[68] Each holding is discussed more fully below.

Section 706 as an Independent Grant of Authority

Section 706 is made up of two relevant sections. Under Section 706(a),

> The FCC and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[69]

Section 706(b), in turn, requires the FCC to conduct a regular inquiry "concerning the availability of advanced telecommunications capability."[70] It further provides that should the FCC find that if "advanced telecommunications capability is [not] being deployed to all Americans in a reasonable and timely fashion," then it "shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."[71] The statute defines "advanced telecommunications capability" to include "broadband telecommunications capability."[72]

Turning first to Section 706(a), the court held that this provision did in fact provide the FCC with an affirmative grant of authority. In the court's view, Congress intended Section 706(a) to act as

a backstop to the deregulation intended by the Telecommunications Act of 1996. As the court observed, "Section 706(a)'s legislative history suggests that Congress may have, somewhat presciently, viewed that provision as an affirmative grant of authority to the FCC whose existence would become necessary if other contemplated grants of statutory authority were for some reason unavailable."[73]

That said, the court was careful to point out that the FCC's authority under Section 706(a) was not unfettered. In fact, the court found that there are at least two limiting principles inherent to Section 706(a). The first limiting principle, according to the court, is that Section 706(a) "must be read in conjunction with other provisions of the Communications Act including, most importantly, those limiting the Commission's subject matter jurisdiction to 'interstate and foreign communication by wire and radio." Thus, reasoned the court, "any regulatory action authorized by Section 706(a) [must] fall within the Commission's subject matter jurisdiction over such communications—*a limitation whose importance this court has recognized in delineating the reach of the Commission's ancillary jurisdiction.*"[74] In other words, Section 706 is not a direct delegation of authority rather, Section 706 should be viewed as an alternative source of ancillary jurisdiction.

The second limiting principle, according to the court, is that "any regulations must be designed to achieve a particular purpose: to 'encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.' Section 706(a) thus gives the FCC authority to promulgate only those regulations that it establishes will fulfill this specific statutory goal…."[75]

Thus dispensing with Section 706(a), the court next turned to Section 706(b). Whether Section 706(b) presented the FCC with an affirmative source of authority was a particularly intriguing question for the court because for the agency's first five *Section 706 Reports*, the FCC always had found that broadband was being deployed on a "reasonable and timely basis."[76] Yet, subsequent to *Comcast* and prior to *Verizon*, the FCC in its *Sixth Section 706 Report* suddenly decided otherwise. While the court conceded that the "timing of the FCC's timing is certainly suspicious,"[77] the court upheld the FCC's use of Section 706(b) for essentially the same reason it provided for the FCC's use of Section 706(a), namely,

> that Congress contemplated that the Commission would regulate this industry, as the agency had in the past, and the scope of any authority granted to it by section 706(b)—limited, as it is, both by the boundaries of the Commission's subject matter jurisdiction and the requirement that any regulation be tailored to the specific statutory goal of accelerating broadband deployment—is not so broad that we might hesitate to think that Congress could have intended such a delegation.[78]

Having determined that both Section 706(a) and Section 706(b) provide an affirmative source of authority (subject to the limitations highlighted above), the court next turned to whether the FCC properly invoked this authority. According to the court, the FCC's "virtuous cycle of investment" model was sufficient justification of a market failure for the use of Section 706.

Under the FCC's "virtuous cycle of investment" model, regulations are required to "protect and promote edge-provider development for more and better broadband technologies, which in turn stimulates competition among broadband providers to further invest in broadband."[79] Stating the agency's model another way, "broadband providers' potential disruption of edge-provider traffic to be itself the sort of 'barrier' that has 'the potential to stifle overall investment in Internet infrastructure'" and, therefore, could "limit competition in telecommunications markets."[80] In buying this argument, however, the court issued dicta which will be a point of contention in the broadband debate for some time.

For example, the court found that BSPs "represent a threat to Internet openness and could act in ways that ultimately would inhibit the speed and extent of future broadband deployment."[81] To support such a conclusion, the court found that BSPs are "motivated to discriminate against and among edge providers" who provide similar services such as VoIP or video. Moreover, the court found that BSPs have "powerful incentives to accept fees from edge providers, either in return for excluding their competitors or for granting them prioritized access to end users." Should such conduct occur, reasoned the court, "the resultant harms to innovation and demand will largely constitute 'negative externalities': any given broadband provider will 'receive the benefits of … fees

but [is] unlikely to fully account for the detrimental impact on edge providers' ability and incentive to innovate and invest.'" Notwithstanding the ample literature showing that such a universal conclusion is not true,[82] the court adamantly held that these potential outcomes are "based firmly in common sense and economic reality."[83]

But the court did not stop there, the court also found that BSPs "have the technical and economic ability to impose such restrictions." To support this conclusion, the court provided several rationales. First, the court found that because "all end users generally access the Internet through a single broadband provider, that provider functions as a 'terminating monopolist,' with power to act as a 'gatekeeper' with respect to edge providers that might seek to reach its end-user subscribers."[84] Second, the court found that this "terminating monopoly" was reinforced by the facts that not only do consumers have "limited" competitive options because "only one or two wireline or fixed wireless firms" provide service in most markets,[85] but that consumers face high switching costs for such services such as "early termination fees; the inconvenience of ordering, installation, and setup, and associated deposits or fees; possible difficulty returning the earlier broadband provider's equipment and the cost of replacing incompatible customer-owned equipment; the risk of temporarily losing service; the risk of problems learning how to use the new service; and the possible loss of a provider-specific email address or website."[86] Finally, the court found that consumers may not be sufficiently sensitive to BSP conduct for competition, if it exists, to protect them from bad conduct. In the court's view:

> Broadband providers' ability to impose restrictions on edge providers does not depend on their benefiting from the sort of market concentration that would enable them to impose substantial price increases on end users—which is all the Commission said in declining to make a market power finding. Rather, broadband providers' ability to impose restrictions on edge providers simply depends on end users not being fully responsive to the imposition of such restrictions.[87]

Yet, oddly, in the *Open Internet Order*, the FCC never made an affirmative finding of market power to justify the imposition of regulation in fact, the FCC made it expressly clear that competition plays *no role* in its application of net neutrality regulation.[88] In so doing, the court went beyond the *Open Internet Order* on competition, further trivializing the role of market power in the analysis of net neutrality regulation.

Issues of Common Carriage

Having found that Section 706 provides an affirmative grant of authority to the FCC (subject to the limitations outlined above), the court next turned to the question of whether the specific rules proposed in the *Open Internet Order*—the anti-discrimination, the "no blocking" and the transparency requirements—constituted an impermissible imposition of common carriage requirements on Title I services.[89] Using the principles detailed in *Cellco*, the court found that the non-discrimination and anti-blocking provisions certainly did.

What is interesting is that the court appeared to focus on the fact that for both the anti-blocking and non-discrimination rules, such prohibitions essentially amounted to the imposition of uniform price regulation to all comers (regardless of customer class), albeit "zero price" regulation.[90] Again, remembering from *Cellco* that a major element of common carriage is the requirement to carry all traffic indiscriminately (as opposed to private carriage, where the practice is to make individualized decisions about whether, and on what terms, to deal), the court found that "the Commission may not claim that the *Open Internet Order* imposes no common carrier obligation simply *because it compels an entity to continue furnishing service at no cost*."[91]

For example, in determining the validity of the non-discrimination requirement the court observed that:

> the *Open Internet Order* makes no attempt to ensure that its reasonableness standard remains flexible. Instead, with respect to broadband providers' potential negotiations with edge providers, the *Order* ominously declares: "it is unlikely that pay for priority would satisfy the 'no unreasonable discrimination' standard." *If the Commission will likely bar broadband providers from charging edge providers for using their service, thus forcing them to sell this service to all who ask at a price of $0, we see no room at all for "individualized bargaining."*[92]

The court's focus on uniform "zero price" regulation applied equally to the FCC's attempt to impose an anti-blocking rule, finding that:

> The anti-blocking rules establish a minimum level of service that broadband providers must furnish to all edge providers: edge providers' "content, applications [and] services" must be "effectively [ ]usable." The *Order* also expressly prohibits broadband providers from charging edge providers any fees for this minimum level of service. *In requiring that all edge providers receive this minimum level of access for free, these rules would appear on their face to impose per se common carrier obligations with respect to that minimum level of service.*[93]

So, while *Verizon* makes clear that the FCC cannot mandate that BSPs universally charge a uniform price to all comers (in this case a "zero" price), the court was ambiguous as to the exact contours of a standard that would pass legal muster. Although the court did hint that a *Cellco*-type "commercially reasonable" test might work going forward, the court suggested that the evaluation of any new rule will be contingent on "*how* the common carrier reasonableness standard applies in . . . context, not *whether* the standard is actually the same as the common carrier standard."[94]

Finally, the court (as appellate courts often do) provided the FCC with a plausible, alternative path for an anti-blocking rule going forward. Specifically, the court hypothesized if the relevant "carriage" BSPs provide "might be access to end-users more generally"—as opposed to a "minimum required service"—then the "anti-blocking rule would permit broadband providers to distinguish somewhat among edge providers" and not result in common carriage. To illustrate this point, the court provided the following hypothetical:

> For example, Verizon might, consistent with the anti-blocking rule—and again, absent the anti-discrimination rule—charge an edge provider like Netflix for high-speed, priority access while limiting all other edge providers to a more standard service. In theory, moreover, not only could Verizon negotiate separate agreements with each individual edge provider regarding the level of service provided, but it could also charge similarly-situated edge providers completely different prices for the same service. Thus, if the relevant service that broadband providers furnish is access to their subscribers generally, as opposed to access to their subscribers at the specific minimum speed necessary to satisfy the anti-blocking rules, then these rules, while perhaps establishing a lower limit on the forms that broadband providers' arrangements with edge providers could take, might nonetheless leave sufficient "room for individualized bargaining and discrimination in terms" so as not to run afoul of the statutory prohibitions on common carrier treatment.[95]

While we do not know at the time of this writing how the FCC will ultimately proceed with its new *Open Internet Rules*, it is important to note that the Commission acknowledged the viability of this legal approach in its *2014 Open Internet NPRM*.[96]

Disclosure Rules Upheld

Finally, we come to the court's treatment of the FCC's transparency/disclosure rules. The court upheld these rules in a single perfunctory sentence: The appellant did "not contend that these rules, on their own, constitute *per se* common carrier obligations, nor do we see any way in which they would."[97] So that, as they say, is that.

Case Summary

While some maintain that Section 706 was never intended to provide the agency with an independent source of regulatory authority, with the DC Circuit's ruling in *Verizon* that question is now moot.[98] As the invocation of Section 706 therefore breaks new legal ground, *Verizon* perhaps raises more questions than provides answers.

Are 706(a) and 706(b) Independent of Each Other? An interesting question raised by *Verizon* is whether Section 706(a) and Section 706(b) may be read independently of each other or whether Section 706(b) is the affirmative trigger for the use of delineated powers contained in 706(a)? Again, Section 706(a) provides that the FCC "shall encourage . . . deployment on a reasonable and timely basis" either by regulatory forbearance or by imposing

additional regulation. Read alone, therefore, a reasonable interpretation would be that Section 706(a) provides the FCC with a continuing independent duty to encourage broadband deployment using the various regulatory powers delineated in that provision. Yet, there also is Section 706(b), which requires the FCC to conduct a regular inquiry and a clear mandate that if the agency finds after such inquiry that broadband is not being deployed "on a reasonable and timely basis," then it "shall take immediate action."

Clearly, at the time the FCC promulgated its original *Open Internet Order*, the agency believed that Section 706(b) was required to trigger the use of its authority in Section 706(a) given the fact that the FCC decided—(in the court's words) "suspicious[ly]"—post-*Comcast* and pre-*Verizon* to find in its *Sixth 706 Report* that broadband was no longer being deployed on a reasonable and timely basis. This view of Section 706 is reasonable given that it is a "fundamental canon of statutory construction that the words in a statute must be read in their context and with a view to their place in the overall statutory scheme."[99] However, if the FCC's original reading of Section 706 was accurate, then the Achilles heel of the legal theory is exposed, *i.e.*, what one FCC finds to be "reasonable and timely" in one *Section 706 Report*, the next FCC can find differently later.

Yet, for whatever reason, the court never looked at how the agency defined the terms "reasonable and timely" for either Section 706(a) or Section 706(b). (Had it done so, given the FCC's naked gerrymandering of its own cost data, we probably would have been looking at a different result.[100]) Instead, the court reasoned that because BSPs—as "terminating monopolists"—*always* have both the incentive and ability to discriminate and, therefore, absent regulation BSPs will *always* will adversely affect the virtuous cycle of investment. With such logic, we can infer that the court takes the view that Section 706(a) is independent from Section 706(b), because the court seemed to say that the defined trigger of Section 706(b) is irrelevant to the FCC's on-going (and independent) effort to promote broadband deployment under Section 706(a) under foreseeable market conditions. If this is the correct reading of *Verizon*, however, then the implications are significant.

To start, a "virtuous cycle," by definition, has no beginning or end. Thus, by endorsing the FCC's "virtuous cycle of innovation" hypothesis and ignoring the "reasonability" (*i.e.*, cost of deployment) requirement part of the statute, the court allows the agency to move the goal posts at whim to ensure its jurisdiction under Section 706 continues indefinitely.[101] To illustrate this point, consider the following hypothetical: Assume *arguendo* the agency has achieved its "Broadband Nirvana," i.e., that every home in every hamlet in America has broadband.[102] Under this scenario, broadband is now "deployed." Yet, if the *speed* of this broadband is deemed insufficient, then under *Verizon* the FCC may continue to impose regulation until the new speed threshold is satisfied, even though the costs of deploying such an upgrade may not be under any legitimate scenario "reasonable."[103] Furthermore, even if a "Broadband Nirvana" is achieved, then the agency may reason that its realization is a direct consequence of regulation, thereby providing justification for the perpetual regulation of the Internet.[104] Given the potential expansion of its powers by viewing Section 706(a) as independent of Section 706(b), it should come as no surprise that the FCC has now embraced this latter view.[105]

Are There Limits on the FCC's Section 706 Authority? Perhaps the clearest message from *Verizon* is that because the FCC made the deliberate policy choice to classify broadband Internet access as a Title I information service, it is prohibited from applying traditional Title II common carriage telephone regulation on Broadband Service Providers. Yet, with the invocation of Section 706, the FCC now has the authority to promulgate "measures that promote competition in the local telecommunications market" via a variety of tools, including "other regulating methods that remove barriers to infrastructure investment." The question at hand, therefore, is whether there are limits to that authority? According to *Verizon*, the answer is yes.

In particular, *Verizon* makes clear that Section 706 does not provide the FCC with a direct delegation of authority. To the contrary and as noted above, *Verizon* holds that Section 706 is really another form of the FCC's ancillary authority—that is, as with any use of its traditional ancillary authority (see discussion of *Comcast*), *Verizon* requires the FCC to tie its use of Section 706 to a specific delegation of authority in Title II, Title III, or Title VI. On top of that, the FCC also must find that its actions are designed to promote additional broadband investment (a requirement, as demonstrated herein, is a bit squishier).

These limitations can be meaningful. For example, *Verizon's* requirement that the FCC tie its use of Section 706 to a specific delegation of authority probably prevents the FCC from extending its regulation to stand-alone edge providers who are not otherwise engaged in jurisdictional activities as some fear (although an aggressive FCC could certainly try).[106] Similarly, *Verizon's* requirement that the FCC tie its use of Section 706 to a specific delegation of authority probably does not enhance the FCC's ability to preempt state laws restricting municipal broadband deployment.[107]

CONCLUSION

This article seeks to answer a straightforward legal question: What are the bounds of the FCC's authority over BSPs? Based on the three cases reviewed here, it is clear that the FCC retains ample jurisdiction over BSPs under current law and, as such, reclassification of broadband Internet access as a Title II common carrier telecommunications service is unwarranted. Indeed, the three recent cases reviewed in this article focused directly on the agency's authority and made a number of significant determinations.

First, where applicable, these cases hold that BSPs are still subject to direct jurisdiction under certain portions of Title II, Title III, and Title VI, hence, the FCC's decision to classify broadband Internet access as a Title I information service does not *a fortiori* mean that the FCC has abdicated its authority over BSPs altogether. To the contrary, to the extent BSPs continue to engage in activities that fall within the agency's direct jurisdiction, the FCC's ability to carry out its traditional core mandate (*e.g.*, spectrum allocation, consumer protection, public safety, universal service, etc.) remains very much intact.

Second, these cases hold that the FCC's ancillary jurisdiction over BSPs remains alive and well, provided that the FCC ties the use of that jurisdiction to a specific delegation of authority under Title II, Title III, or Title VI. In this sense, nothing has changed. So, while ancillary authority remains a potent and legally-sound tool in the FCC's regulatory arsenal to remedy policy-relevant harms, especially on a case-by-case basis, the agency must provide its whys-and-wherefores to the court.

Third, with the DC Circuit's ruling in *Verizon*, the FCC now has an *additional hook for ancillary authority* under Section 706 to regulate BSPs, subject to two important limitations: (1) just as with the FCC's use of its traditional ancillary authority, in order to invoke Section 706 the FCC must tie its actions back to a specific delegation of authority in Title II, Title III, or Title VI; and (2) the FCC also must demonstrate that any use of Section 706 is designed to promote infrastructure investment and deployment on a reasonable and timely basis. As shown below, these limitations can be meaningful. For example, because the FCC must tie its invocation of Section 706 to a specific delegation of authority, this requirement probably prevents the FCC from extending regulation to stand-alone edge providers who are not otherwise engaged in jurisdictional activities as some fear. Similarly, because the FCC must tie its use of Section 706 to a specific delegation of authority in the Communications Act, Section 706 probably does not expand the FCC's authority to preempt state laws restricting municipal broadband deployment.

Finally, these cases make clear that because the FCC classified broadband as a Title I information service, the FCC is prohibited by statute from imposing traditional Title II common carrier obligations on BSPs. That is, the agency may not regulate using the traditional "unjust and unreasonable" or "undue discrimination" standards. However, these cases also hold that the FCC may regulate the conduct of BSPs under a "commercially reasonable" standard, which, the courts' reasoned, permits individualized transactions and is thus sufficiently different from common carrier regulation to be lawful. That being said, as the D.C. Circuit held in *Verizon*, evaluation of any new "commercially reasonable" standard will be contingent on "*how* the common carrier reasonableness standard applies in … context, not *whether* the standard is actually the same as the common carrier standard."

While this article is limited to the *legal question* of what are the bounds of the FCC's authority over BSPs, the more salient *policy question* of how the FCC should exercise that authority always looms large in the background. Certainly, there are those who argue that there is no longer a need for an "expert" agency and, as such, the FCC should be stripped of most, if not all of its regulatory functions and to leave resolution of competitive issues to the

antitrust authorities.[108] This author disagrees. While the Federal Communications FCC definitely can and should do more to remove prescriptive regulation over BSPs,[109] given both the limits of a traditional antitrust analysis for industries characterized by high fixed and sunk costs and the significant social obligations imposed on the industry by Congress (e.g., universal service), an expert agency with significant oversight to resolve policy problems and disputes on a case-by-case basis remains important.[110] As these cases indicate, the FCC's ability to act in this capacity remains strong.

Accordingly, the real question—as always—is whether the agency will exercise its authority wisely.

NOTES

1. *See, e.g.*, In re Motion of AT&T Corp. to Be Reclassified as a Non-Dominant Carrier, FCC 95-427, 11 FCC Rcd. 3271 (1995) and citations therein.
2. Indeed, it should be noted that prior to the enactment of the 1996 Act, the Communications Act did not contain any provisions that would expressly allow the agency to forbear lawfully from applying portions of the Act. Thus, for example, when the FCC tried to eliminate tariff requirements for non-dominant long-distance carriers, the Supreme Court held that the agency lacked this authority. *See* MCI v. AT&T, 512 U.S. 218 (1994).
3. 47 U.S.C. § 160.
4. In the Matter of Federal-State Joint Board on Universal Service, Federal Communications Commission, FCC 98-67, 13 FCC Rcd 11,830, Report to Congress (rel. April 20, 1998) (available at *http://www.fcc.gov/Bureaus/Common_Carrier/Reports/fcc98067.pdf*) at ¶82.
5. For a detailed list of potential regulatory obligations that would be triggered by reclassification, *see, e.g.*, AT&T Ex Parte, FCC GN Docket No. 14-28 (May 9, 2014) (available at *http://apps.fcc.gov/ecfs/document/view?id=7521120564*).
6. *See, e.g.*, G.S. Ford and L.J. Spiwak, *Section 10 Forbearance: Asking The Right Questions To Get The Right Answers*, 23 CommLaw Conspectus 126 (2014) (available at: *http://scholarship.law.edu/commlawvol23/iss1/5*);
7. *See* G.S. Ford and L.J. Spiwak, *Tariffing Internet Termination: Pricing Implications of Classifying Broadband as a Title II Telecommunications Service*, Phoenix Center Policy Bulletin No. 36 (September 2014) (available at: *http://www.phoenix-center.org/PolicyBulletin/PCPB36Final.pdf*) and forthcoming Federal Communications Law Journal 2015; Section 10 Forbearance, *id.*
8. *See* G.S. Ford, L.J. Spiwak and M. Stern, "The Broadband Credibility Gap," 19 CommLaw Conspectus 75 (2010) (available at *http://www.phoenix-center.org/papers/CommlawConspectusBroadbandCredibilityGap.pdf*) (hereinafter "Broadband Credibility Gap"); G.S. Ford and L.J. Spiwak, "What is the Effect of Regulation on Broadband Investment? Regulatory Certainty and the Expectation of Returns," *Phoenix Center Policy Perspective No. 12-05*: (September 19, 2012) (available at *http://www.phoenix-center.org/perspectives/Perspective12-05Final.pdf*).
9. 47 U.S.C. § 153(24) defines an "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." This definition is a near-perfect description of Internet access services.
10. *See* Communications Act Section 4(i), 47 U.S.C 154(i), which provides that the FCC "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." For a good summary of the FCC's ancillary authority, *see* B. Esbin and A. Marcus, " 'The Law Is Whatever the Nobles Do:' Undue Process at The FCC," 17 *CommLaw Conspectus* 1 (2009) (available at *http://commlaw.cua.edu/res/docs/Esbin-Marcus-Revised-2.pdf*).
11. *See, e.g.*, In re Petition for Declaratory Ruing that Pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, FCC 04-27, 19 FCC Rcd 3307, Memorandum and Order (rel. February 19, 2004) (hereinafter the "Pulver Order").
12. National Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).
13. *See* In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, FCC 05-150, 20 FCC Rcd 14853, 14862, Report and Order and Notice of Proposed Rulemaking (rel. September 23, 2005), *aff'd* Time Warner Telecom, Inc. v. FCC, 507 F.3d 205 (3d Cir. 2007).
14. In re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, FCC 07-30, 22 FCC Rcd 5901, Declaratory Ruling (rel. March 23, 2007).
15. In re United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service, FCC 06-165, 21 FCC Rcd 13281, 13281, Memorandum Opinion and Order (November 7, 2006).
16. *See, e.g.*, K. High, "Digital Pioneers Remember Past, Forecast Future of the Internet," *Politics365* (December 6, 2013) (available at *http://politic365.com/2013/12/06/digital-pioneers-remember-past-forecast-future-of-the-internet/v*).
17. For example, one argument in favor of reclassification is that Title II would bar "fast lanes" versus "slow lanes." However, a basic review of both the case law and economic theory would demonstrate this to be a false argument. *See* G.S. Ford and L.J. Spiwak, "Non-Discrimination or Just Non-Sense: A Law and Economics Review of the FCC's New Net Neutrality Principle," *Phoenix Center Perspective No. 10-03* (March 24, 2010) (*http://www.phoenix-center.org/perspectives/Perspective10-03Final.pdf*).
18. *See, e.g.*, M. Ammori, "Net Neutrality's Legal Binary: an Either/Or With No 'Third Way'" (May 13, 2014) ("If we want a rule against discrimination and against new access fees, we need Title II.") (available at *http://ammori.org/2014/05/13/net-neutralitys-legal-binary-an-either-with-no-third-way*); Comments of Public Knowledge and Common Cause, FCC Docket No. 14-28 (March 21, 2014) ("Title II is the proper regulatory framework for telecommunications services such as broadband.") (available at *http://apps.fcc.gov/ecfs/document/view?id=7521094713#page=1&zoom=auto,-265,547*); Comments of Voices for Internet Freedom, FCC Docket No. 14-28 (March 21, 2014) ("Title II cannot just be on the table; Title II needs to be the main course.") (available at *http://apps.fcc.gov/ecfs/document/view?id=7521094791*).
19. In the Matter of Technology Transitions, AT&T Petition to Launch a Proceeding Concerning the TDM to IP Transition; Connect America Fund; Structure and Practices of the Video Relay Service Program; Telecommunications Relay Services And Speech to Speech Services for Individuals with Hearing and Speech Disabilities; Numbering Policies for Modern Communications, FCC 14-5, 29 FCC Rcd 1433, Order, Report And Order And Further Notice Of Proposed Rulemaking, Report And Order, Order And Further Notice Of Proposed Rulemaking, Proposal For Ongoing Data Initiative (rel. January

31, 2014) (available at *http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0131/FCC-14-5A1.pdf*).

20. In the Matter of Protecting and Promoting the Open Internet, FCC 14-61, 29 FCC Rcd 8305, Notice of Proposed Rulemaking (rel. May 15, 2014) (hereinafter "2014 Open Internet NPRM").
21. Significantly, the Supreme Court recently strengthened the Chevron Doctrine to give the FCC—as the "expert agency"—great deference to interpret the Communications Act in the digital age. *See* City of Arlington, Texas v. FCC, 133 S.Ct. 1863 (2013). For an interesting examination of this case, *see* S.L. Feder, M.E. Price, A.C. Noll, "City *of Arlington v. FCC*: The Death of Chevron Step Zero?," 66 *Federal Communications Law Journal* 47 (2013).
22. Comcast v. FCC, 600 F.3d 642 (D.C. Cir. 2010).
23. Cellco Partnership v. Verizon, 700 F.3d 534 (D.C. Cir. 2012).
24. Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).
25. Given that national security and law enforcement issues often are governed by other statutes (*e.g.*, CALEA) which have a "wholly distinct legislative history and Congressional purpose" from that of the Communications Act, *see, e.g.*, Time Warner Telecom v. FCC, 507 F.3d 205, 119-220 (3d Cir. 2007), any discussion about how the FCC's decision to classify broadband Internet access as an information service impacts the FCC's authority to comply with these type of statutes is beyond the scope of this article.
26. *See* 47 U.S.C. § 153(51) ("A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services…")
27. For a good general overview of the "just and reasonable" and "unreasonable discrimination" standards, see L. J. Spiwak, *Understanding the Net Neutrality Debate: A Basic Legal Primer*, Bloomberg BNA (July 23, 2014) (available at: *http://www.phoenix-center.org/BloombergBNA23July2014.pdf*).
28. *Verizon*, 740 F.3d at 657 (citations omitted and emphasis in original).
29. In re Formal Complaint of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, FCC 08-183, 23 FCC Rcd. 13,028, Memorandum and Order (rel. August 20, 2008).
30. *Comcast*, 600 F.3d at 644.
31. *See supra* n. 10.
32. *See, e.g.*, the preamble of the Telecommunications Act of 1996, which provides that the Act is intended "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced information technologies and services to all Americans by opening all telecommunications markets to competition." Conference Report, Telecommunications Act of 1996, House of Representatives, 104th Congress, 2d Session, H. Rpt. 104-458, at p. 1.
33. Section 230(b), 47 U.S.C. § 230(b), provides that:

    It is the policy of the United States—

    (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

    (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

    (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

    (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

    (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.
34. Section 1, 47 U.S. Code § 151, provides, in relevant part, that: "For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States… a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges… there is created a commission to be known as the 'Federal Communications Commission'…"
35. *Comcast*, 600 F.3d at 654.
36. *Id.* at 655 (citations omitted).
37. *Comcast*, 600 F.3d at 658-659. As noted *infra*, subsequent to this decision, the FCC reversed course and found that Section 706 did, in fact, provide it with a separate source of authority.
38. 47 U.S.C. § 256(b)(1).
39. *Comcast*, 600 F.3d at 659.
40. 47 U.S.C. § 257.
41. *Comcast*, 600 F.3d at 659-660.
42. For example, University of Pennsylvania Professor Kevin Werbach argued that a better legal strategy for the FCC would have been to use its ancillary authority under Section 251 of the Telecommunications Act. Kevin D. Werbach, "Off the Hook," 95 *Cornell L. Rev.* 535 (2010). While I thought Professor Werbach perhaps went a bit too far with the application of his theory, I readily conceded that the argument had some merit. *See* The Broadband Credibility Gap, *supra* n. 8.
43. *See generally*, Esbin and Marcus, *supra* n. 10.
44. Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile data services, FCC 11-52, 26 FCC Rcd 5411, Second Report And Order (rel. April 7, 2011) (hereinafter "Data Roaming Order").
45. In re Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, FCC 07-143, 22 FCC Rcd. 15817, Report And Order And Further Notice Of Proposed Rulemaking (rel. August 16, 2007) (hereinaffer "2007 Voice Roaming Order") (codifying that automatic roaming is a common carrier service subject to the protections of Sections 201 and 202 of the Communications Act); In re Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile data services, FCC 10-59, 25 FCC Rcd. 4181, Order on Reconsideration and Second Further Notice of Proposed Rulemaking (rel. April 21, 2010) (hereinafter "2010 Voice Roaming Order").
46. 47 USC § 332(c)(2) (emphasis supplied).
47. *Cellco*, 700 F.3d at 541.
48. 47 U.S.C. § 303(b).
49. 47 U.S.C. § 303(r).
50. *Cellco*, 700 F.3d at 542.
51. *Id.* at 542-543.
52. 46 U.S.C. § 316.
53. *Cellco*, 700 F.3d at 543-544.
54. As noted above, under Section 332 of the Communications Act, providers of "commercial mobile services," such as wireless voice-telephone services, are common carriers, whereas providers of other mobile services are exempt from common carrier status. *See* 47 U.S.C. § 332(d)(2), 46 U.S.C. § 332(c)(2).
55. 47 U.S.C. § 153(11).
56. *Cellco*, 700 F.3d at 538.
57. *Id.* at 546.
58. *Id.*

59. *Id.* at 547.
60. *Id.* at 547 (citations omitted).
61. *Id.* at 548.
62. *See* Pulver Order, *supra* n. 11.
63. *C.f.*, In re FCC 11-161, 753 F.3d 1015 (10th Cir., May 23, 2014) (upholding FCC's plan to allocate Universal Service Funds to pay for broadband, rather than traditional POTS, networks under Title II).
64. *See, e.g.*, 47 U.S.C. §201(b) ("All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful").
65. *See, e.g.*, 47 USC § 202(a) ("It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.")
66. *See* In re Preserving The Open Internet, FCC 10-201, 25 FCC Rcd 17905, Report and Order (rel. December 23, 2010) (hereinafter "Open Internet Order").
67. Recalling from the discussion of Comcast, supra, the FCC had originally attempted to rely on Section 706, but the court shot down that argument on the grounds that because the agency, at the time of Comcast, had stated that Section 706 did not grant it independent authority. Subsequent to Comcast and prior to Verizon, however, the FCC reversed course and found that, in fact, Section 706 did grant it authority. The court accepted the FCC's change in policy, noting that "even a federal agency is entitled to a little pride." *Id.* at 636-637.
68. *See supra* n. 26.
69. 47 U.S.C. § 1302(a).
70. 47 U.S.C. § 1302(b).
71. *Id.*
72. 47 U.S.C. § 1302(d)(1).
73. *Verizon*, 740 F.3d at 638-639.
74. *Id.* at 639-640 (emphasis supplied).
75. *Id.* at 640.
76. *See* In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, FCC 10-129, 25 FCC Rcd 9556, Sixth Broadband Deployment Report (rel. July 20, 2010) (available at *https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-129A1_Rcd.pdf*).
77. *Id.* at 642.
78. *Id.* at 641.
79. *Id.* at 642.
80. *Verizon*, 740 F.3d at 642-643 (citations omitted).
81. *Id.* at 645.
82. *See, e.g.*, G.S. Ford, T.M. Koutsky and L.J. Spiwak, "The Welfare Impacts of Broadband Network Management: Can Broadband Service Providers be Trusted?" *Phoenix Center Policy Paper No. 32* (March 2008) (available at *http://www.phoenix-center.org/pcpp/PCPP32Final.pdf*).
83. *Verizon*, 740 F.3d at 645-646.
84. *Id.* at 646. In the same vein, the court upheld the FCC's reasoning that the "ability to act as a 'gatekeeper' distinguishes broadband providers from other participants in the Internet marketplace—including prominent and potentially powerful edge providers such as Google and Apple—who have no similar 'control [over] access to the Internet for their subscribers and for anyone wishing to reach those subscribers.'" *Id.*
85. Noticeably, the court ignored the presence of multiple mobile broadband providers. Unfortunately, the DC Circuit is not the only court of general jurisdiction to discount the effect of wireless substitution. *See, e.g.*, Qwest v. FCC, 689 F.3d 1214 (10th Cir. 2012) (upholding FCC's Phoenix Forbearance Order).
86. *Verizon*, 740 F.3d at 646-647.
87. *Id.* at 648 (citations omitted).
88. *See, e.g.*, Open Internet Order, *supra* n. 66 at ¶ 32 ("... these threats to Internet-enabled innovation, growth, and competition do not depend upon broadband providers having market power with respect to end users ...") and at n. 87 ("Because broadband providers have the ability to act as gatekeepers even in the absence of market power with respect to end users, we need not conduct a market power analysis.").
89. *See* 47 U.S.C. § 153(51), *supra* n. 26.
90. *See, e.g.*, G.S. Ford and M. Stern, "Sabotaging Content Competition: *Do Proposed Net Neutrality Regulations Promote Exclusion?*" *Phoenix Center Perspective No. 10-02*: (March 4, 2010) (available at *http://www.phoenix-center.org/perspectives/Perspective10-02Final.pdf*).
91. *Verizon*, 740 F.3d at 654 (emphasis supplied).
92. *Id.* at 657 (citations omitted and emphasis in original).
93. *Id.* at 658 (emphasis supplied).
94. *Id.* at 657 (emphasis in original).
95. *Id.* at 658.
96. 2014 Open Internet NPRM, *supra* n. 20 at ¶¶ 91-109.
97. *Verizon*, 740 F.3d at 659.
98. *See, e.g.*, M. O'Rielly, "FCC's Grab For New Regulatory Power Could Go Beyond Broadband Providers," *The Hill* (May 5, 2014)

    ("Congress never intended to give the FCC that authority. I know because I was in the room, as a congressional staffer, when that deal was made.") (available at *http://thehill.com/special-reports/technology-may-5-2014/205260-fccs-grab-for-new-regulatory-power-could-go-beyond*).
99. *See, e.g.*, Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809 (1989).
100. G.S. Ford and L.J. Spiwak, "*Justifying the Ends: Section 706 and the Regulation of Broadband*," 16 *Journal of Internet Law* 1 (January 2013) (available at *http://www.phoenix-center.org/papers/JournalofInternetLawSection706.pdf*); L. Spiwak, "The FCC Contradicts Their Facts (Again) To Justify Expanded Broadband Regulation," *@lawandeconomics* (February 20, 2013) (available at *http://phoenix-center.org/tbloglarchives/11185*).
101. *See Verizon*, 740 F.3d 640-641, where the court noted that when the FCC first established its definition of broadband of 200 kps in 1999, "the Commission recognized that technological developments might someday require it to reassess the 200 kbps threshold. In the Sixth Broadband Deployment Report, the Commission decided that day had finally arrived." (Citations omitted.)
102. For an additional exploration into the fallacies of a "Broadband Nirvana", *see, e.g.*, T.R. Beard, G.S. Ford, L.J. Spiwak, M. Stern, "The Broadband Adoption Index: Improving Measurements and Comparisons of Broadband Deployment and Adoption," 62 *Federal Communications Law Journal* 343 (2010).

103. *See, e.g.*, G.S. Ford, "Sloppy Research Sinks Susan Crawford's Book," *@lawandeconomics* (January 18, 2013) (available at *http://phoenix-center.org/blog/archives/1075*) (demonstrating that Professor Susan Crawford's claims that the cost of building ubiquitous fiber to be only $50-$90 billion was based on a failure to quote sources correctly and that a legitimate estimate of ubiquitous fiber was around $350 billion).

104. *See* 2014 Open Internet NPRM, *supra* n. 20___ at ¶ 143. (According to the FCC, it now views "sections 706(a) and (b) as independent and overlapping grants of authority that give the FCC the flexibility to encourage deployment of broadband Internet access service through a variety of regulatory methods, including removal of barriers to infrastructure investment and promoting competition in the telecommunications market, and, in the case of section 706(b), giving the FCC the authority to act swiftly when it makes a negative finding of adequate deployment.")

105. *Id.* at ¶ 145 ("[W]e note that Congress did not define 'deployment.' We believe Congress intended this term to be construed broadly, and thus, consistent with precedent, we have interpreted it to include the extension of networks as well as the extension of the capabilities and capacities of those networks.")

106. As noted *supra* in n. 84, the court in Verizon went out of its way to note that if the FCC wanted to extend its Section 706 authority to edge providers, then the agency would have to demonstrate that such edge providers are able to act in a "gatekeeper" capacity.

107. For a full explanation of this point, *see*, L.J. Spiwak, *FCC Has No Authority to Preempt State Municipal Broadband Laws*, Bloomberg BNA (August 6, 2014) (available at *http://www.phoenix-center.org/BloombergBNAMuniBroadband.pdf*).

108. *See, e.g.*, R. Bennett, J.A. Eisenach, J.K. Glassman, B.E. Howell, J. Hurwitz, R. Layton and B. Swanson, "Comments on Communications Act Modernization" (January 31, 2014) (available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2388723*); R.E. Litan and H.J. Singer, "The Need for Speed: A New Framework for Telecommunications Policy for the 21st Century" (Brookings Institution Press 2013).

109. *See, e.g.*, "The Impossible Dream: Forbearance After the Phoenix Order," *supra* n. 6; T. Randolph Beard, George S. Ford and Lawrence J. Spiwak, *Market Definition and the Economic Effects of Special Access Price Regulation*, 22 CommLaw Conspectus 237 (2014) (available at: *http://scholarship.law.edu/commlawfvol22/iss2/10*).

110. *See, e.g.*, "A Fresh Analytical Start at the FCC," *@lawandeconomics* (October 11, 2013) (available at *http://phoenix-center.org/blog/archives/1518*); G.S. Ford and L.J. Spiwak, "Equalizing Competition Among Competitors: A *Review of the DOJ's Spectrum Screen Ex Parte Filing*," *Phoenix Center Policy Bulletin No. 33* (May 2013) (available at *http://www.phoenix-center.org/PolicyBulletin/PCPB33Final.pdf*); T.R. Beard, G.S Ford, L.J. Spiwak and M. Stern, "*Wireless Competition Under Spectrum Exhaust*," 65 *Federal Communications Law Journal* 79 (2012); T.M. Koutsky and L.J. Spiwak, "*Separating Politics from Policy in FCC Merger Reviews: A Basic Legal Primer of The 'Public Interest' Standard*," 18 *CommLaw Conspectus* 329 (2010); G.S. Ford, T.M. Koutsky, L.J. Spiwak, "*Competition After Unbundling: Entry, Industry Structure and Convergence*," 59 *Federal Communications Law Journal* 331 (2007).

February 2, 2015

Via Electronic Filing

Chairman THOMAS WHEELER,
Commissioner MIGNON CLYBURN,
Commissioner JESSICA ROSENWORCEL,
Commissioner AJIT PAI,
Commissioner MICHAEL O'RIELLY,
Federal Communications Commission,
Washington, DC.

RE: *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG DOCKET NO. 02–278

Dear Chairman Wheeler and Commissioners Clyburn, Rosenworcel, Pai, and O'Rielly:

The undersigned trade associations and business groups, representing hundreds of thousands of U.S. companies and organizations from across the U.S. economy, strongly urge the Federal Communication Commission ("FCC" or "Commission") to expeditiously address the issues raised in the numerous petitions that have been and continue to be filed with the Commission regarding the Telephone Consumer Protection Act ("TCPA"). Given that compliance-minded organizations in a variety of sectors are being dragged into court and strong-armed into large settlements on an almost daily basis under the TCPA, for actions that do not remotely threaten the privacy interests that the statute was intended to protect, regulatory relief by the Commission is desperately required. We ask for clarification from the FCC to help curb abusive lawsuits that likely harm consumers overall.

I. Consumer Use of Wireless Phones is Vastly Different Than When the TCPA Was Enacted Almost 25 Years Ago

In response to complaints about unwanted telemarketing telephone calls, especially during dinner time, Congress passed the TCPA in 1991. It includes a provision that prohibits the use of "automatic telephone dialing systems" (a term defined by Congress with specific elements)—instead of manual dialing—or an artificial or prerecorded voice under certain circumstances when calling a wireless telephone.

When the TCPA was enacted over two decades ago, wireless telephones were a luxury item, charges for receiving calls on a wireless telephone were prohibitively expensive, and the landline telephone was the dominant consumer telecommunications device. However, as the Commission itself has acknowledged, "wireless use has expanded tremendously since the passage of the TCPA in 1991." [1] Today, 90 percent of Americans own wireless telephones [2] and 58.8 percent of households are entirely or predominantly "wireless-only." [3] Moreover, the number of "wireless-only" households grew by 3 percent between the second half of 2013 and the first half of 2014, the largest 6-month increase since 2010, and there are five demographic groups in which the majority live in households with only wireless telephones.[4] Certain parts of the country also have a particularly high number of wireless-only households.[5] Furthermore, many consumers today have calling plans that provide unlimited minutes, making use of wireless telephones inexpensive as well as convenient for the general public.

Compared to 1991, organizations today—including many small businesses—use efficient, automated technologies to place a variety of time-sensitive, non-telemarketing calls. Unfortunately, due to a lack of clarity under the TCPA, these important communications are increasingly being chilled, organizations making the calls are increasingly being subjected to frivolous litigation, and consumers are increasingly missing important communications. This situation has a disproportion-

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[1] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 27 FCC Rcd 1830, ¶29 (2012) ("*2012 TCPA Order*").

[2] Pew Internet Project, *Mobile Technology Fact Sheet,* Pew Research Center (2014), available at *http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/*.

[3] Stephen J. Blumberg & Julian V. Luke, Div. of Health Interview Statistics, Nat'l Ctr. for Health Statistics, Centers for Disease Control and Prevention, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January–June 2014,* at 1 (Dec. 16, 2014) ("*CDC Wireless Substitution Estimates*"), available at *http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201412.pdf*.

[4] *Id.* at 2; those demographic groups are adults aged 18–44, adults living only with unrelated adult roommates, adults renting their home, adults living in poverty or near poverty, and Hispanic adults.

[5] *Id.* at 7. *See also, Wireless-only Voice Households by State, 2012,* Wireless Competition Bureau, FCC (rel. Jan. 7, 2015), available at *http://transition.fcc.gov/Daily__Releases/Daily__Business/2015/db0107/DOC-331388A1.pdf*.

ately negative impact on lower-income households, particular age groups, and residents located in certain parts of the United States.[6]

II. Regulatory Clarity Regarding the TCPA is Desperately Needed

While the wireless marketplace and consumer use of this technology have rapidly evolved, the TCPA has not changed and the FCC's regulations have not kept pace. There is, unfortunately, a tsunami of class action TCPA lawsuits driven not by aggrieved consumers, but by opportunistic plaintiffs' firms taking advantage of uncertainty in the law to rake in attorney fees. As the immense record before the Commission details, TCPA lawsuits against businesses and other entities are skyrocketing. TCPA litigation grew by 560 percent between 2010 and 2014.[7]

The law is being abused through litigation theories never intended by Congress. For example, some plaintiffs contend that any system (whether or not it is actually an "automatic telephone dialing system" as defined by the statute) triggers TCPA liability under the perplexing theory that *even a system that is not automatic could be modified to later become automatic, hypothetically sometime in the future.* Others contend that a system need not even have the statutory elements of an "automatic telephone dialing system" to be an "automatic telephone dialing system" under the statute. This cannot be what Congress intended.

The defendants in these cases are no longer just the telemarketers that Congress targeted; they are businesses, big and small alike, forced to choose between settling the case or spending significant money defending an action where the alleged statutory damages may be in the millions, or even billions, of dollars. Further, many of these companies are being sued for reasons outside of their control, such as dialing a number provided by a customer that was later reassigned to another party.

The wide-spread litigation and the specter of devastating class action liability has or may spur some businesses and organizations to cease communicating important and time-sensitive non-telemarketing information via voice and text to the detriment of customers, clients, and members. Without FCC action, consumers may not, for example, be timely informed of options to avoid a foreclosure, going into collection, a bad credit rating, or confiscation of property; receive notice of payments due and other billing issues; receive basic requested information ranging from time-sensitive prescription refill reminders and other healthcare notifications to the details of a money transfer and other financial transactions; or receive information specifically requested by the consumer through an on demand text. The benefits of these services cannot be overstated–in the student loan market, it is estimated that 1 million or more borrowers each year will "time out" and default on their student loans, in large part because their servicers cannot efficiently reach them on their wireless devices.[8] By helping to keep individuals current on their payments, or, at least, preventing their debt from spiraling out of control, these types of communications have the ability to lower costs for consumers.

The undersigned groups ask for clarification from the FCC so that the statute is applied in the manner that Congress intended, as expressed through the specific language Congress enacted. As reflected in the record before the FCC, the requested clarifications will neither "gut" the TCPA nor "open the floodgates" to abusive calls. The clarifications will, however, curb abusive lawsuits that ultimately are likely to harm consumers overall. We urge the Commission to modernize its TCPA implementation by providing commonsense clarifications and necessary reforms to facilitate the delivery of time-sensitive consumer information to mobile devices while continuing to protect consumers from unwanted telemarketing calls.[9]

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[6] According to estimates from the CDC, 59.1 percent of individuals living in "Poor" households and 50.8 percent of individuals living in "Near-poor" households live in wireless-only households. Comparatively, only 40.8 percent of individuals living in "Not-poor" households live in wireless-only households. *CDC Wireless Substitution Estimates* at 6.

[7] *Debt Collection Litigation & CFPB Complaint Statistics, December 2014 & Year in Review,* WebRecon LLC (Jan. 22, 2015), available at *http://dev.webrecon.com/debt-collection-litigation-cfpb-complaint-statistics-december-2014-and-year-in-review/.*

[8] Judy Xanthopolous, *Modifying the TCPA to Improve Services to Student Loan Borrowers and Enhance Performance of Federal Loan Portfolios,* Quantria Strategies, LLC, 10 (Jul. 2013), available at *http://c.ymcdn.com/sites/www.ncher.us/resource/collection/A593D8BC-DA09-45BB-8A2D-EDD4E0889108/QuantriaStudyreTCPA-July2013.pdf.*

[9] We recognize that the Commission has exempted certain categories of calls to wireless numbers that are "not charged to the called party." *See Cargo Airline Association Petition for Expedited Declaratory Ruling, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* Order, 29 FCC Rcd 3432 ¶20 (2014). But "free to end user" is not the solution, particularly outside of the context of text notifications; no such program for uncharged voice calls to wireless phones exists now in the marketplace, and many communications (such as healthcare calls to elderly patients) can only be delivered by voice communications, not texts.

III. Conclusion

By addressing the important issues raised in the pending TCPA-related petitions, the Commission can help curtail abusive lawsuits that will likely lead to increased costs for consumers, provide American businesses with desperately needed certainty, and ensure that businesses maintain the ability to communicate in an efficient manner that best meets the demands of their customers, while at the same time preserving the important goals of the TCPA. The FCC, as an expert agency, must recognize that the world has changed significantly since 1991 and it is time for the FCC to clarify and modernize its TCPA rules to reflect the realities of today.

Sincerely,

American Association of Healthcare Administrative Management (AAHAM)
ACA International
American Council of Life Insurers (ACLI)
American Financial Services Association (AFSA)
American Insurance Association (AIA)
Child Support Enforcement Council (CSEC)
Coalition of Higher Education Assistance Organizations (COHEAO)
Computer & Communications Industry Association (CCIA)
Consumer Bankers Association (CBA)
DBA International
Education Finance Council (EFC)
Independent Bankers Association of Texas (IBAT)
Marketing Research Association (MRA)
Mobile Marketing Association (MMA)
National Association of Chain Drug Stores (NACDS)
National Association of College and University Business Officers (NACUBO)
National Association of Manufacturers
National Association of Mutual Insurance Companies (NAMIC)
National Association of Retail Collection Attorneys (NARCA)
National Association of Student Financial Aid Administrators (NASFAA)
National Cable & Telecommunications Association
National Council of Higher Education Resources (NCHER)
National Restaurant Association
National Retail Federation (NRF)
National Rural Electric Cooperative Association (NRECA)
Professional Association for Customer Engagement (PACE)
Retail Industry Leaders Association (RILA)
Satellite Broadcasting & Communications Association (SBCA)
Silver Users Association
State Creditor Bar Associations [10]
Student Loan Servicing Alliance (SLSA) & SLSA Private Loan Committee
Telecommunications Risk Management Association (TRMA)
U.S. Chamber of Commerce
U.S. Chamber Institute for Legal Reform
Virginia Small Business Partnership

[10] Creditor's Attorney Association of Alabama; Alaska Creditor Bar; Arizona Creditor Bar Association, Inc.; Arkansas Creditors Bar Association, Inc.; California Creditors Bar Association; Colorado Creditor Bar Association, Inc.; Connecticut Creditor Bar Association; Florida Creditors Bar Association, Inc.; Collection Law Section of the Hawaii State Bar Association; Illinois Creditors Bar Association; Maryland-DC Creditors Bar Association; Minnesota Creditors Rights Association; Missouri Creditor Bar Inc.; New Jersey Creditors Bar Association; Consumer Credit Association of Metropolitan New York; Commercial Lawyers Conference of New York; The Creditor's Rights Attorneys Association of Nevada; North Carolina Creditors Bar Association; Pennsylvania Creditors' Bar Association; Tennessee Creditors Bar Association; Texas Creditor's Bar Association; Wisconsin Creditors' Rights Association, Inc.

VCXC
Washington, DC, March 17, 2015

Committee on Commerce, Science, and Transportation,
Russell Senate Office Building 254,
Washington, DC.

Committee on Energy and Commerce,
2125 Rayburn House Office Building,
Washington, DC.

Dear Senators Thune, Nelson, Wicker, Shatz and Representatives Upton, Pallon, Walden, Eshoo:

Thank you for arranging for the testimony of the Federal Communication Commission regarding the February 26, 2015 approval of the Open Internet Order. Please consider including the following questions:

1. Do you think the Internet would have been more successful under a Title II regime?
2. Why does the Commission redefine Public Switched Network (PSN) to encompass both the telephone network and the Internet ?
3. In what sense do you believe there exists an equivalence between telephone numbers and IP addresses that justifies the Commission regulating the Internet and telephone network as a single network?
4. When did Congress extend Federal Communication Commission authority over computer networks?
5. What principle does the Commission include that limits the Order to "communication" issues?
6. Are you aware bringing all public IP addresses into the definition of Public Switched Network increases by at least a factor of 10 the segment of the economy under Commission jurisdiction?
7. The Order identifies use of discretionary forbearance, but does the Order identify the limit of Commission discretionary authority?
8. Can you think of an example that falls outside Commission authority to "tailor" and "modernize" the Communication Act of 1934 that requires Congressional intervention?
9. What percentage of Internet transactions over the last decade do you suspect suffer the types of violations of open Internet principles the Commission seeks to address in the Order?
10. What can you point to as the contributions of the Federal Communication Commission to the expansion of the Internet over the last 20 years?
11. What percentage of Commission staff do you consider expert on Internet issues, and do you anticipate the need to expand Commission staff in support of implementing the Order?
12. Can you name three successful start-up's relying on Commission exercise of Title II authority?
13. Can you make a no new taxes pledge to the communicating public with regard to the reclassification of Broadband Internet Access Service as a Title II service.

Please include this letter a part of the committees' respective oversight hearing records.

Sincerely,

DANIEL BERNINGER,
Founder,
VCXC.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO HON. TOM WHEELER

Question 1. Under the reasoning adopted in the Open Internet Order, should a dial-up Internet service provider (ISP) also be classified as a common carrier? Does a dial-up ISP perform any functions different than, or in addition to, those the FCC attributes to a BIAS provider that would enable the FCC to classify the dial-up ISP as an information service provider? If so, what are those functions? Do you think classification of a dial-up ISP as a common carrier was something that anyone anticipated in 1996?

Answer. The *Open Internet Order* does not address the classification of dial-up Internet access service. The scope of the *Open Internet Order* is Broadband Internet Access Service, which is defined as "a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service."[1] This comes from the definition the Commission adopted in 2010. The *2010 Open Internet Order* noted that the market and regulatory landscape for dial-up Internet access service differed from broadband Internet access service.[2]

Question 2. Under the Computer Inquiry rules, the FCC determined that the transmission component of wireline broadband service was limited to a connection between the customer and the ISP, and did not include any connections between the ISP and the rest of the Internet. How does the FCC justify adopting a more expansive classification in the Open Internet Order, which includes every ISPs' connection with the rest of the Internet as a subsidiary part of the common carrier service sold to the end user?

Answer. Consistent with Supreme Court precedent, the *Open Internet Order* applies the 1996 Act to broadband Internet access service based on record evidence about how that service exists and is offered today. The Commission's Computer Inquiry proceeding drew a line between (1) basic services, which were subject to common carrier regulation; and (2) enhanced services, which were not. The 1996 Act effectively tracked that distinction in its definitions of "telecommunications" and "information" services. The Supreme Court in the *Brand X* case held that those terms are ambiguous with respect to their application to cable modem service and that the Commission is entitled to deference in its interpretation and application of those terms.[3] In the *Open Internet Order,* the Commission exercised its authority, upheld by the Supreme Court in *Brand X,* to interpret the 1996 Act based on the current facts in the record about how broadband is offered today.

With respect to broadband providers' interconnection (also called Internet traffic exchange) practices, the D.C. Circuit in *Verizon* v. *FCC* recognized that broadband providers have "gatekeeper" control over the flow of content.[4] Interconnection is simply the operation of the gate. The *Open Internet Order* explains that broadband Internet access service providers' interconnection arrangements are implicit in the provision of retail broadband service that offers consumers access to the entire Internet and, in any event, are provided for and in connection with that service.[5] Thus, the Commission concluded that "disputes involving a provider of broadband Internet access service regarding Internet traffic exchange arrangements that interfere with the delivery of a broadband Internet access service end user's traffic are subject to our authority under Title II of the Act."[6]

Question 3. The definition of "information service" was based largely on the definition that applied to the Bell Operating Companies under the Modified Final Judgment (MFJ) following divestiture. In United States v. Western Elec. Co., 673 F. Supp. 525, 587–97 (D.D.C. 1987), aff'd in part, rev'd in part, 900 F.2d 283 (D.C. Cir. 1990), the MFJ court determined that gateway services constituted information services "under any fair reading" of the definition. How would you distinguish Inter-

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[1] *Protecting and Promoting the Open Internet,* GN Docket No. 14–28, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15–24, para. 25 (rel. Mar. 12, 2015) (*Open Internet Order*).

[2] *Preserving the Open Internet,* GN Docket No. 09–191, WC Docket No. 07–52, Report and Order, 25 FCC Rcd 17905, 17932, para. 44, 17935, para. 51 (2010) (*2010 Open Internet Order*), *aff'd in part, vacated and remanded in part sub nom. Verizon* v. *FCC,* 740 F.3d 623 (D.C. Cir. 2014).

[3] *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.,* 545 U.S. 967, 980–81 (2005) (*Brand X*).

[4] *Verizon,*740 F.3d 623, 646 (D.C. Cir. 2014).

[5] *Open Internet Order* at para. 204.

[6] *Open Internet Order* at para. 204.

net access service as offered today from those services that the MFJ found to fall unambiguously within the definition of Internet access?

Answer. The *Open Internet Order* properly relies on law and facts that supersede the AT&T Modified Final Judgment, instead applying statutory terms from the 1996 Act to broadband as it exists and is offered today. The Supreme Court in *Brand X* held that the relevant statutory terms were ambiguous as to the provision of cable modem service and that the Commission is entitled to deference in its interpretation and application of those terms. In the *Open Internet Order,* the Commission exercised its authority to interpret ambiguous terms in the statute and found, based on the record, that broadband Internet access service today is best understood as including a telecommunications service offering.

Question 4. On June 8, 2011, NCTA and COMPTEL filed a petition for reconsideration seeking modification of the pole attachment rules to ensure equal treatment of cable operators and telecommunications carriers. Will you commit to ensuring that this petition is resolved before the Open Internet Order takes effect? If not, please explain why the FCC would require more than four years to address this petition.

Answer. As I recently told participants at NCTA's Internet & Television Expo, I am committed to ensuring that cable operators do not confront excessive rates for pole attachments. On May 6, 2015, the FCC's Wireline Competition Bureau issued a short public notice to refresh the record on the pending NCTA and COMPTEL petition for reconsideration seeking to bring cable and telecommunications rates into closer alignment. Once the record is refreshed, my expectation is that a recommendation to the full Commission to bring the rates into as close alignment as the Communications Act allows will be forthcoming.

Question 5. The FCC and state utility commissioners long ago recognized that, if utility-style regulation applies to Internet access service, "it would be difficult to devise a sustainable rationale under which all. . .information services did not fall into the telecommunications service category."[7] Do you agree with that previous Commission finding?

Answer. The statement quoted in your question comes from the 1998 *Stevens Report,* which was a report to Congress concerning the implementation of universal service mandates, and not a binding Commission Order classifying broadband Internet access services. In any event, the Commission did *not* find in the *Stevens Report* that broadband Internet access service—in the form it is offered today—was an information service. When the Commission issued that report, in 1998, broadband Internet access service was at "an early stage of deployment to residential customers" and constituted a tiny fraction of all Internet connections.[8] Virtually all households with Internet connections used traditional telephone service to dial-up their Internet Service Provider (ISP), which was typically a separate entity from their telephone company.[9] The *Stevens Report* reserved judgment on whether entities that provided Internet access over their own network facilities were offering a separate telecommunications service.[10] The Commission further noted that "the question may not always be straightforward whether, on the one hand, an entity is providing a single information service with communications and computing components, or, on the other hand, is providing two distinct services, one of which is a telecommunications service."[11] The *Open Internet Order* concluded, based on a current record, that broadband Internet access service today includes a separable telecommunications service offering.

Question 6. Under the FCC's Open Internet Order rationale, why are the services provided by content distribution networks (CDNs) not classified as telecommunications services? Do they not just transmit information? How are the information processing, retrieval and storage functions of CDN services different from the information functions that are provided as part of broadband Internet access services?

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[7] Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd 11501, para. 57 (1998).

[8] *See Inquiry Concerning the Deployment of Advanced Telecommunications Services to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* CC Docket No. 98–146, Report, 14 FCC Rcd 2398, 2446, para. 91 (1999); Ind. Anal. & Tech. Div., Wireline Comp. Bur., *Trends in Telephone Service,* 2–12, chart 2.10, 16–3, Tbl. 16.1 (Aug. 2008).

[9] *See Stevens Report,* 13 FCC Rcd 11501, 11540, para. 81.

[10] *Stevens Report,* 13 FCC Rcd at 11530, para. 60 ("[T]he matter is more complicated when it comes to offerings by facilities-based providers."), 11535 n.140 ("We express no view in this Report on the applicability of this analysis to cable operators providing Internet access service.").

[11] *Id.,* 13 FCC Rcd at 11530, para. 60.

Answer. The scope of the Open Internet Order is broadband Internet access services, which do not include content delivery networks (CDNs).[12] As the Order explained, "The Commission has historically distinguished these services from 'mass market' services and, as explained in the *2014 Open Internet NPRM,* they do not provide the capability to transmit data to and receive data from all or substantially all Internet endpoints. [13]

Question 7. The FCC's Fiscal Year 2016 budget submission distinguishes between full time equivalent positions (FTEs) supported by regulatory fees and FTEs supported by auction revenues. What will happen to auction-funded FTEs once the broadcast incentive auction is complete? Because no other substantial auctions are currently expected, will there be a reduction in the number of FTEs supported by auction revenues in the coming years? How many FTEs funded by the Spectrum Auctions Program work primarily in the FCC headquarters at the Portals? Do any FTEs funded by the Spectrum Auctions Program work at other FCC facilities, and if so, how many and at which facilities?

Answer. After the broadcast incentive auction is complete, any term spectrum auction funded FTEs to support the broadcast incentive auction will be terminated and the total number of spectrum auction funded FTEs is likely to decrease in number, provided that additional spectrum auction activity is reduced. The total number of Spectrum Auction Program FTEs at September 30, 2014 was 216. Of this number, approximately 201 FTEs worked primarily in the FCC headquarters at the Portals. Approximately 15 FTEs worked at the Gettysburg facility. No other FTEs worked on the Spectrum Auctions Program at any other facility other than the headquarters and Gettysburg locations.

Question 8. The FCC's Fiscal Year 2016 budget submission explains that the Spectrum Auctions Program had nearly $318 million of available cash as of September 30, 2014. How much available cash is projected to be available as of September 30, 2015?

Answer. The Commission is projected to have approximately $488 million available at September 30, 2015. These funds will allow the Commission to complete the broadcaster incentive auction and the relocation of broadcasters, which is estimated to start in FY 2016 and end in FY 2019.

Question 9. In its Fiscal Year 2016 budget submission, the FCC projects 1,671 FTEs in FY 2016, a reduction of 37 from FY 2015's 1,708. Please provide the Committee with the number of non-contract FTEs at the FCC for each of the last ten years. Also, please provide the number of contract positions funded by the FCC for each of the last ten years.

Answer. The total number of non-contract FTEs at the FCC for each of the last ten years and the number of contract positions funded by the FCC for FY 2009 through FY 2015 is listed in the table below. The Commission does not have records to support the number of contract positions funded by the FCC for FY 2006 through FY 2008.

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Total FTEs	1,816	1,793	1,776	1,779	1,775	1,776	1,725	1,723	1,716	1,690
Total Contractors	Not Available	Not Available	Not Available	959	813	576	551	551	501	503

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. ROGER F. WICKER TO HON. TOM WHEELER

Question 1. In the FCC's February 26, 2015 press release announcing its *Open Internet Order,* the Commission indicates that with respect to Section 254 of the Telecommunications Act of 1996 there will be a "partial application of Section 254."

(a) Which parts of section 254 will apply and which parts of section 254 will not apply?

Answer. In the *Open Internet Order,* the Commission forbore in part from the first sentence of section 254(d) "insofar as [it] would immediately require new universal service contributions associated with broadband Internet access service." [1] The Commission also forbore from sections 254(g) (concerning rates charged by providers of

[12] *Open Internet Order* at para. 340.
[13] *Id.* (internal quotation marks omitted).
[1] *Open Internet Order,* at para. 488.

interexchange telecommunications services) and (k) (prohibiting the use of revenues from a non-competitive service to subsidize a service that is subject to competition).

(b) What does "partial application" mean?

Answer. "Partial application" refers to the fact that the *Open Internet Order* applied much of section 254 to broadband Internet access service, but forbore from the specific requirements described above in response to question 1(a).

(c) What effect will the *Open Internet Order* have on the universal service lifeline program?

Answer. The *Open Internet Order* applies what the Commission describes as the "policy-making provisions" of section 254 to broadband Internet access service. The Commission found that taking that step would "give us greater flexibility in pursuing" universal service policies relating to broadband Internet access services and would provide "another statutory justification" in support of policies already underway and other goals that the Commission has articulated, such as support for robust, broadband-capable networks in rural America.[2]

(d) What effect will the *Open Internet Order* have on the universal service schools and libraries program?

Answer. The *Open Internet Order* does not make any changes to the E-rate program. However, as in the *2010 Open Internet Order,* the Commission has provided that the Open Internet rules apply to mass-market broadband Internet access services purchased with the support of the E-rate program.

(e) What effect will the *Open Internet Order* have on the universal service rural healthcare program?

Answer. The *Open Internet Order* does not make any changes to the rural healthcare program. However, in applying the "policy-making provisions" of section 254 to broadband Internet access service, the Commission adopted an approach that would "give us greater flexibility in pursuing" universal service policies relating to broadband Internet access services and would provide "another statutory justification" in support of policies already underway and other goals that the Commission has articulated.[3]

(f) What effect will the *Open Internet Order* have on the telecommunications relay service fund?

Answer. The *Open Internet Order* applies section 225 of the Communications Act to broadband Internet access services. Among other things, section 225 mandates the availability of interstate and intrastate TRS to the extent possible and in the most efficient manner to individuals in the United States who are deaf, hard of hearing, deaf-blind, and who have speech disabilities. In declining to forbear from section 225, the Commission explained that "[a]s technologies advance, section 225 maintains our ability to ensure that individuals who are deaf, hard of hearing, deaf-blind, and who have speech disabilities can engage in service that is functionally equivalent to the ability of a hearing individuals who do not have speech disabilities to use voice communication services."[4] The Commission forbore, however, from the application of TRS contribution obligations that otherwise would newly apply to broadband Internet access service.

(g) What effect will the *Open Internet Order* have on Universal Service Fund support for broadband Internet access service, especially in rural areas?

Answer. The *Open Internet Order* does not make any changes to Universal Service Fund support for rural and other high-cost areas. The *Open Internet Order* applies what the Commission describes as the "policy-making provisions" of section 254 to broadband Internet access service. The Commission found that taking that step would "give us greater flexibility in pursuing" universal service policies relating to broadband Internet access services and would provide "another statutory justification" in support of policies already underway and other goals that the Commission has articulated, such as support for robust, broadband-capable networks in rural America.[5]

Question 2. Section 254 (d) provides that "every telecommunications carrier that provides interstate telecommunications services shall contribute . . . to preserve and advance universal service." The FCC's press release indicates that "the Order DOES NOT require broadband providers to contribute to the Universal Service Fund under section 254. The question of how best to fund the Nation's universal

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[2] *Id.* at para 486.
[3] *Id.*
[4] *Id.* at para. 468.
[5] *Id* at para. 486.

service programs is being considered in a separate, unrelated proceeding that is already underway."[6]

(a) What is the Commission's plan for funding universal service now that the FCC has reclassified broadband Internet access service as a telecommunications service?

(b) Do you support universal service contributions from providers of broadband Internet access service?

Answer—combined response for (a) and (b). The *Open Internet Order* did not alter the Commission's ongoing processes for determining whether and how to reform the universal service contributions mechanism. The Commission has a pending rulemaking regarding contributions reform, and has referred issues relating to contributions reform to the Federal-State Joint Board on universal service. I look forward to considering any recommendations the Joint Board puts forward to address the question of whether broadband Internet access providers should contribute.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. ROY BLUNT TO HON. TOM WHEELER

Question 1. You have held in place broadcast media ownership rules, many of which are decades old—including one that dates back to 1941. How do you square this with the ownership rules in place for other FCC regulated entities, like cable, satellite and wireless companies?

Answer. The Commission issued a Notice of Proposed Rulemaking seeking comment on current media ownership rules. It is important to remember that the Commission has attempted to revisit media ownership rules but they have been remanded on several occasions by the Third Circuit. However, as we review the rules, we are taking steps to increase opportunities for broadcasters and potential new entrants.

One of the first votes I took as Chairman was to approve a Declaratory Ruling to clarify the Commission's policies and procedures for reviewing broadcast transactions involving foreign ownership and investment. The hope is that this will unleash new capital to help existing and future media entities serve the needs and interests of their communities. Another change we have enacted is the enforcement of our existing local ownership rules to close loopholes when we adopted new attribution rules for the use of joint sales agreements (JSAs) for television stations.

Thus, despite the fact broadcast media ownership rules have been in place for a long time, we will continue toreview and adapt our rules where and when it is warranted.

Question 2. In 1991, Congress passed the Telephone Consumer Protection Act (TCPA). The intent of the legislation was to cut down on the growing number of unwanted telemarketing calls interrupting families and consumers at home. At the time, 90 percent of households used a landline telephone, but today technology is changing as more households "cut the cord" and use wireless phones.

Despite the change in technology, TCPA regulations have not kept pace and need to be modernized.

Today, there are numerous petitions that have been pending at the FCC for months, and in many cases for over a year.

The lack of action by the FCC is hurting consumers. For example, as Chairman of the Appropriations Subcommittee on Labor, Health, and Education, I hear from student loan servicers who cannot contact graduates in danger of becoming delinquent on their payments.

This is detrimental to a student's long-term credit, and the problem extends to virtually every business across every sector of the economy.

I'd like to submit for the record a letter to the FCC that was signed by 35 diverse trade associations affected by the outdated TCPA.

Congress did not envision this state of affairs when it enacted TCPA. What is your plan for addressing these pending petitions?

Answer. As you note, Congress enacted the TCPA in 1991 to protect consumers from specific unwanted calls. The statute and the Commission's implementing rules prohibit the use of automatic telephone dialing systems and artificial or prerecorded voice messages to make non-emergency calls to wireless numbers and other specified recipients without prior express consent.

Petitions for declaratory ruling now pending before the Commission raise a variety of issues, including what equipment qualifies as an autodialer and how consent from consumers must be obtained to comply with this statutory requirement. The

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[6] *https://www.fcc.gov/document/fcc-adopts-strong-sustainable-rules-protect-open-internet*

Chairman has circulated a proposal to his fellow commissioners that would resolve more than 20 of these petitions. The Chairman's proposal would provide the clarity that businesses and other callers have requested. The proposal is based on an extensive record in response to the petitions, including numerous informative meetings with trade associations, small business owners, state attorneys general, consumer groups, and other interested parties, including those with debt collection interests that are similar to student loan services.

Please be assured that we have carefully considered the input of all stakeholders, including callers and consumers alike, on the consent requirement and other issues in the Chairman's proposed decision.

Question 3. It's become distressingly normal for the FCC to ignore Congress and obstruct our attempts at oversight.

For example, in 2011, a bipartisan group of 33 senators—including myself—sent a letter to the FCC expressing concerns for a waiver to be granted to a company called LightSquared. The waiver would have been disastrous to Global Positioning System (GPS) technology. The letter had no effect, and the waiver remained on track.

Senator Grassley initiated a formal investigation, and was told by the FCC that the Commission is not obligated to answer to anyone except the Chairman of the Senate Commerce Committee and the Chairman of the House Energy & Commerce Committee.

Mr. Chairman, I don't hold you at fault for the actions of your predecessor, but do you agree that the FCC is unaccountable to 99.6 percent of the Members of Congress?

Answer. Congress maintains the ability to amend our organic statute, pass laws affecting our work and determine our spending levels. Accordingly, the FCC, although specifically designated by Congress as an Independent Regulatory Agency, answers to Congress.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DEB FISCHER TO HON. TOM WHEELER

Question 1. All Commissioners, over 40 members of the Senate signed a letter to the FCC last year seeking a way for rate-of-return carriers to receive USF support for broadband-only subscribers. When will the FCC make this bipartisan priority a reality?

Answer. Last April, the Commission unanimously proposed a number of key principles for any reform: (a) support amounts must remain within the existing rate-of-return budget; (b) support must be distributed equitably and efficiently; (c) support must be based on forward-looking costs; and (d) no double recovery may occur for broadband costs. We recognize the substantial time, effort, and resources that have been invested in this effort to date, but significant questions remain as to whether the existing proposals fully meet the Commission's principles. While we have made no final decisions to adopt or reject any particular proposals, we do believe that more work can be done to develop a holistic plan that meets the principles set out by the Commission to ensure that high-cost support is distributed in a manner that maximizes public benefits.

In March, my fellow Commissioners and I made a commitment to Senator Thune to reform the USF support mechanisms for rate-of-return carriers by the end of the year. I take that commitment very seriously. I have asked stakeholders in the rate-of-return community for their creative cooperation in getting this job done for rural consumers. I look forward to continuing the work of modernizing the universal service fund high-cost program and to working with stakeholders, including rural carriers and consumers, to ensure that that we are delivering the best possible voice and broadband experiences to rural areas.

Question 2. All Commissioners, what effect does reclassification have on the costs that cable ISPs will have to pay to attach their wires to utility poles and what will this change mean for my rural constituents that are cable broadband customers?

Answer. The *Open Internet Order* applies section 224 of the Communications Act to broadband Internet access services, and in so doing ensures that companies providing broadband Internet access service—but not previously entitled to the protections of section 224—will have access to utility poles at reasonable rates. With respect to the regulated rates at which cable companies are able to attach their wires to utility poles, as I recently told participants at NCTA's Internet & Television Expo, I am committed to ensuring that cable operators do not confront excessive rates for pole attachments. On May 6, 2015, the FCC's Wireline Competition Bureau issued a short public notice to refresh the record on the pending NCTA and

COMPTEL petition for reconsideration seeking to bring cable and telecommunications rates into closer alignment. Once the record is refreshed, my expectation is that a recommendation to the full Commission will be forthcoming to bring the rates into as close alignment as the Communications Act allows.

Question 3. Chairman Wheeler, the law defines an "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." Why doesn't the plain language of the statute compel a finding that Internet access is, at least primarily, an information service that enables consumers to generate, acquire, store, transform, process, retrieve, utilize or make available information?

Answer. The Supreme Court in the *Brand X* case held that the terms telecommunications service and information service are ambiguous with respect to their application to cable modem service and that the Commission is entitled to deference in its interpretation and application of those terms.[1] In the *Open Internet Order,* the Commission exercised its authority, upheld by the Supreme Court in *Brand X,* to interpret these terms based on the current facts in the record. Specifically, based on the substantial record compiled in response to the NPRM, the Commission determined that "providers today market and offer consumers separate services that are best characterized as (1) a broadband Internet access service that is a telecommunications service; and (2) "add-on" applications, content, and services that are generally information services."[2]

Paragraphs 355 through 387 of the *Open Internet Order* provide a thorough analysis as to why the Commission concluded that the broadband Internet access service fits within the statutory definition of a "telecommunications service" rather than an "information service."

Question 4. Chairman Wheeler, I'm concerned that President Obama's new Internet regulations were written in a "one-size-fits-all" way so small cable operators in Nebraska, wireless ISPs across the country, and even municipal broadband networks will be treated similarly to bigger broadband companies. The president's own Small Business Administration even admonished the FCC that its proposed rules would unduly burden small businesses. Was there any concern at the FCC about how President Obama's Open Internet Order will negatively impact small Internet service providers, and why did they get swept up in this 400-page order?

Answer. The *Open Internet Order* ensures that all persons who subscribe to broadband Internet access service—regardless of whether they live in a densely-populated city or a very rural area—have the freedom to use the Internet to conduct commerce, communicate, educate, entertain, and engage in the world around them.

In developing carefully-tailored open Internet protections, the Commission carefully considered comments from small ISPs and their representatives. Indeed, it was largely based on the concerns of smaller providers that the Commission declined to adopt certain enhancements to the Open Internet transparency rule that were proposed in the *2014 Open Internet NPRM*—such as a requirement to disclose the source of congestion, packet corruption, and jitter. In addition, the Commission granted a temporary exemption to small ISPs (defined for this purpose as those with 100,000 or fewer subscribers) from all enhancements to the transparency rule, and it directed the Commission's Consumer & Governmental Affairs Bureau to determine whether to maintain that exemption and at what threshold by December 15, 2015. More generally, the Commission can and does grant waivers where a small entity cannot bear a burden appropriate to larger entities.[3]

Question 5. Chairman Wheeler, why didn't the FCC offer more APA notice and comment on Title II prior to the president's YouTube video?

Answer. The Notice of Proposed Rulemaking issued by the Commission in May 2014 expressly identified and sought comment on the potential reclassification of broadband Internet access service. During the extended comment cycle—of over 100 days—parties had more than sufficient opportunity to comment, and nearly four million comments were filed. As the *Open Internet Order* stated, the approach adopted by the Commission "is one that the NPRM expressly identified as an alternative course of action. It is one on which the Commission sought comment in almost every section of the NPRM. It is one that several broadband Internet access service providers vigorously opposed in their comments in light of their own reading of the

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[1] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 980–81 (2005) (*Brand X*).

[2] *Open Internet Order,* at para. 341

[3] *Id. at para.* 530 (citing waiver possibility for Title II obligations); *see, e.g.,* Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, 17 FCC Rcd 14841 (2002) (extending compliance deadline for smaller providers only).

NPRM."[4] The Commission provided ample notice of the approach that we adopted in the final order, in full compliance with our legal obligations under the Administrative Procedures Act.

Question 6. Chairman Wheeler, does the FCC's reclassification decision mean that the FTC no longer has jurisdiction over the privacy activities of broadband providers? Because of the reclassification decision, are we about to lose the FTC's expertise when it comes to ISPs' privacy practices?

Answer. I believe this question refers to the so-called "common carrier" exception that Congress included in the FTC Act. The FCC is not expert in, or in a position to comment on, the FTC's jurisdiction. That said, the FCC has substantial expertise and experience in protecting the privacy of customers of communications networks, and is committed to bringing that expertise and experience to bear in the context of broadband Internet access services. In addition, the FCC has a close working relationship with the FTC, and looks forward to continued collaboration on many matters.

Question 7. Chairman Wheeler, can you explain how the FCC can preempt state governance of municipal broadband when the Supreme Court ruled in *Nixon v. Missouri Municipal League* the commission does not have this authority? Specifically, how are the federalism issues different under section 706 and section 253?

Answer. In Section 706 of the Telecommunications Act of 1996, Congress directed the Commission to encourage broadband deployment and take immediate action to remove barriers to infrastructure investment and promote competition when advanced broadband is not being deployed to all Americans in a reasonable and timely fashion.

In our February 26, 2015 decision regarding certain state laws in North Carolina and Tennessee, the Commission found that certain statutory provisions in the North Carolina and Tennessee statutes constituted barriers to broadband infrastructure investment and competition, and we preempted those provisions pursuant to our authority under section 706. This action was taken in response to petitions for preemption filed by the City of Wilson, North Carolina (Wilson) and the Electric Power Board of Chattanooga, Tennessee (EPB).

The Commission's decision to preempt does not preempt restrictive laws with respect to municipal broadband in other states. However, the decision does establish a precedent for reviewing similar laws in other states, and the *Order* stated that the agency would not hesitate to preempt other, similar state laws if those laws constitute barriers to broadband deployment.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JERRY MORAN TO HON. TOM WHEELER

Question 1. In 2012 the Department of State, working with the Federal Communications Commission, reached a long anticipated agreement with the Mexican Government regarding spectrum sharing in the 800 MHz band to ensure both countries' operators would be permitted to maximize use of this spectrum band without unnecessary interference. Following the signing of this "Revised Protocol" then-Chairman Genachowski praised the agreement for the public safety and wireless broadband benefits that would result. Unfortunately the Mexican Government has yet to act upon the responsibilities assumed by Mexico in the agreement. As you know, the domestic benefits of this agreement are completely dependent upon Mexican action—and as a result are at a standstill almost three years following the signing of the Protocol. What is the FCC doing to resolve this international standstill?

Answer. While negotiations with Mexico have not progressed as quickly as we would like, the FCC has engaged with our Mexican counterparts since 2012—including throughout Mexico's telecommunications regulatory reform which took place in 2012–2014—to realize the benefits of the Revised Protocol. Subsequent to the establishment of Mexico's new regulatory agency the Federal Telecommunications Institute (IFT) in September 2013, FCC staff worked with IFT staff to reestablish relationships with the appropriate contacts and team members responsible for 800 MHz issues in Mexico.

Since 2013, the FCC, in coordination with the State Department, has held several in-person meetings both in Mexico City and in Washington with IFT staff and Commissioners, and video conferences. Since 2014, FCC and IFT staff have worked together diligently on various 800 MHz related policy and legal issues and have held regular task force calls. FCC Chairmen and Commissioners have repeatedly raised

[4] *Id* at para. 387.

the 800 MHz rebanding issue during their meetings with Mexican officials, including the ITU Plenipotentiary in Korea in October 2014 and most recently at the GMSA Mobile World Congress in Barcelona, Spain in March, 2015. The FCC has been waiting for IFT to issue new licenses to incumbent Mexican licensees that need to move out of the portion of the 800 MHz band spectrum that will be used for public safety. During the most recent call with IFT staff on April 28, 2015, IFT staff indicated that they are in the process of finalizing the necessary steps to issue new licenses to authorize the clearing of the 800 MHz band.

Question 1a. How has the FCC coordinated with the Department of State to resolve this issue?

Answer. The FCC has coordinated closely with State Department on these issues since the signing of the Revised Protocol with Mexico in 2012. State Department has been invited and has participated in the in-person task force meetings in Mexico City and at the FCC with IFT staff, as well as teleconferences and videoconferences with Mexican counterparts.

Question 1b. When can Congress expect to see progress by the Mexican government to ensure that the hoped-for public and economic benefits are fully realized?

Answer. The FCC has been assisting ITF as much as possible, but Mexico does not have an accurate database of its licensees like the FCC does. IFT staff have been collecting data from their licensees and reporting the information to the FCC so that our Transition Administrator can plan the relocation for both countries. While Mexico is making some progress, the FCC has emphasized to IFT the importance of moving forward on this issue as quickly as possible. One of the problems facing Mexico is that it has some government licensees whose relocation is more complex. All incumbent licensees must be issued new licenses in different spectrum before relocation can begin. IFT indicated recently that it is working towards issuing new licenses and taking the necessary steps to clear the 800 MHz band, but has not committed to any specific dates.

Question 2. More than 900 small cable operators across the country rely upon a single buying group, the National Cable Television Cooperative (NCTC), to purchase the programming they offer their customers. Existing law clearly indicates that Congress intended to prevent programmers from charging "buying groups" discriminatory rates. However, due to problems with the manner in which the FCC drafted its rules, the NCTC does not enjoy the protections Congress intended. This problem was brought to the FCC's attention in June of 2012. In October 2012, the FCC issued a rulemaking tentatively concluding that its definition of a "buying group" needs to be modernized to fix this problem and sought comment on this matter. The issue has now been before the FCC for more than two years, and last year the Small Business Administration has urged the FCC to act. What is the status of this proceeding? Does the FCC intend on examining this rule this year? Why or why not?

Answer. The Media Bureau continues to evaluate the record in this proceeding, which raises complex legal and policy issues impacting not just small cable operators but also programmers. The Bureau is analyzing the costs and benefits of such a rule change as well as the effect of this proposed rule change on the video marketplace generally. While I understand the concerns raised by the NCTC, nothing is prohibiting the NCTC from qualifying as a buying group under the existing rules, as they previously have done. The companies can create a reserve under the Commission's existing rules and have the protections of Section 628, but have chosen not to. At this time, it appears that these companies are getting agreements, and we are unclear on the need for Federal intervention at this time.

Question 3. According to the agency's FY 2016 budget request, the FCC has not requested additional full time employees. Can you please describe in detail the composition of the FCC staff by position type? How many attorneys does the FCC employ? How many economists does the FCC employ? How many engineers does the FCC employ? How many administrative staff does the FCC employ? How has that changed over the past 5 years? Please provide detail on other positions that may not be included in the questions above.

Answer. The FCC employs 1,686 employees (as of April 18, 2015). The current breakdown of FCC employees by type of positions is as follows:

- 592 Attorneys
- 60 Economists
- 256 Engineers
- 149 in administrative offices/positions
- 629 employees in other occupations, such as analysts, specialists, IT, and accounting/finance positions.

Over the past 5 years, the total number of employees has declined from the FCC's staffing levels in FY 2010 to the present. For comparison, the FY 2010 figures by type of position were as follows:

- 544 Attorneys
- 57 Economists
- 270 Engineers
- 201 in administrative offices/positions
- 760 in other occupations, such as analysts, specialists, IT, and accounting/finance positions.

Question 4. One of the goals of the 2011 Connect America Fund proceeding was to transition universal service support away from voice services to broadband service for unserved Americans. Last year, 130 Members of Congress wrote to the FCC urging progress on universal service updates that are tailored for small companies so they could receive support for offering stand-alone broadband, which consumers are increasingly demanding. I understand that the FCC has sought comment on such updates at least three times now in the last few years. When will the FCC make additional progress in this regard? What more data or information does the FCC need to collect in order to achieve this goal?

Answer. Last April, the Commission unanimously proposed a number of key principles for any reform: (a) support amounts must remain within the existing rate-of-return budget; (b) support must be distributed equitably and efficiently; (c) support must be based on forward-looking costs; and (d) no double recovery may occur for broadband costs. We recognize the substantial time, effort, and resources that have been invested in this effort to date, but significant questions remain as to whether the existing proposals fully meet the Commission's principles. While we have made no final decisions to adopt or reject any particular proposals, we do believe that more work can be done to develop a holistic plan that meets the principles set out by the Commission to ensure that high-cost support is distributed in a manner that maximizes public benefits.

In March, my fellow Commissioners and I made a commitment to Senator Thune to reform the USF support mechanisms for rate-of-return carriers by the end of the year. I take that commitment very seriously. I have asked stakeholders in the rate-of-return community for their creative cooperation in getting this job done for rural consumers. I look forward to continuing the work of modernizing the universal service fund high-cost program and to working with stakeholders, including rural carriers and consumers, to ensure that that we are delivering the best possible voice and broadband experiences to rural areas.

Question 5. Describe the role of the FCC's Chief Information Officer (CIO) in the development and oversight of the IT budget for your agency. How is the CIO involved in the decision to make an IT investment, determine its scope, oversee its contract, and oversee continued operation and maintenance?

Answer. The FCC's CIO is situated within the Office of Managing Director and works directly with both the Managing Director and the Chief Financial Officer. The CIO provided significant input to determine the FCC's IT investment—which is reflected in the Fiscal Year 2016 budget. All requested programmatic funding increases, apart from the restacking/move of the FCC, are IT-based. We continue to strengthen the IT staff by hiring more experienced personnel, bringing in highly-skilled detailees from other agencies to oversee implementation, and decreasing the number of contractors. The IT department has "intrapreneurs" who work closely with each bureau and office assessing programming in order to (1) prioritize projects according to available funding; and (2) provide the necessary data for budgeting IT projects.

Question 6. Describe the existing authorities, organizational structure, and reporting relationship of the Chief Information Officer. Note and explain any variance from that prescribed in the newly-enacted Federal Information Technology and Acquisition Reform Act of 2014 (FITARA, PL 113–291) for the above.

Answer. Although I am aware that OMB still must provide substantial guidance on agency implementation of the Act, the FCC was already moving in the right direction to ensure that our CIO had the support and level of responsibility contemplated by Congress. FITARA mandates a "significant role" in programming, budgeting and decision-making related to IT at their agencies, including approving the IT portion of the annual budget requests agencies submit to Congress. The FCC CIO clearly has this responsibility within the Commission.

The FCC's CIO works directly with the CFO and Managing Director to develop the budget, and he has access to enhanced procurement staff with an IT focus. Spe-

cifically, the CIO has implemented a cross-Commission perspective in order to replicate capabilities and reuse applications across the agency—a key component of FITARA. Strategic sourcing and consolidation also are key initiatives. The CIO has demonstrated the use of both of these initiatives in the lift and shift to a Federal data center and the use of Software as a Platform in his new initiatives.

In fact, the FCC has an outstanding CIO and we hope that by building his department and strengthening and empowering his staff, we will serve as a role model for IT good governance. In addition, our CIO has a good working relationship with the Federal CIO and is in step with efforts to modernize the approaches to the acquisition and implementation of IT in government.

Question 7. What formal or informal mechanisms exist in your agency to ensure coordination and alignment within the CXO community (*i.e.,* the Chief Information Officer, the Chief Acquisition Officer, the Chief Finance Officer, the Chief Human Capital Officer, and so on)?

Answer. Given the compact nature of the FCC, the Office of Managing Director (OMD) coordinates and directs the office's staff, including the CFO and CIO. Also situated under OMD are human resources and procurement office personnel. The combination of these offices within OMD and the elevated status of the CIO in answering directly to the Managing Director have ensured that the Commission's planning efforts are well coordinated through regular internal contacts.

These support functions also coordinate closely with other parts of the FCC. For example, the CIO conducts regular briefings with the individual Bureau/Office chiefs and deputies to inform them of upcoming IT related upgrades and changes. He also works closely with high level Commission staff to develop systems acquisitions requirements.

Question 8. According to the Office of Personnel Management, 46 percent of the more than 80,000 Federal IT workers are 50 years of age or older, and more than 10 percent are 60 or older. Just four percent of the Federal IT workforce is under 30 years of age. Does your agency have such demographic imbalances? How is it addressing them?

Answer. The demographic probably is representative of all of the Federal Government, but the Commission does not consider an applicant's age when making hiring decisions. The FCC also is proud that its working environment encourages loyal staff and excellent retention of highly qualified personnel. During the past year, the FCC has endeavored to hire and retain qualified, skilled staff regardless of their age, including respected personnel detailed from other agencies. We believe that we need to maintain a fully staffed IT shop and decrease dependency on IT contractors. Until we receive essential funding, however, we will be unable to fully meet needed staffing levels.

Question 9. How much of the agency's budget goes to Demonstration, Modernization, and Enhancement of IT systems as opposed to supporting existing and ongoing programs and infrastructure? How has this changed in the last five years?

Answer. The Government Accountability Office has noted that Federal agencies currently spend more than 70 percent of their IT budgets on maintaining legacy systems. The FCC, like other agencies, has been caught in this legacy trap; as of the end of FY13, we were trending well above even the Federal average of 70 percent. In fact, the FCC has trended as high as 80 percent for Operations and Maintenance (O&M) and this level actually increased during the past five years.

We have tackled the problem of legacy systems head-on and targeted all available resources toward modernizing our IT systems. But we require additional funds to make this a reality, or risk maintaining high-cost, antiquated and inefficient systems. The FCC's Fiscal Year 2016 budget requests $5.8 million to replace the FCC's legacy infrastructure with a managed IT Service provider, as well as one-time infusions of $9.6 million to rewrite the FCC's legacy applications as part of a modular "shift" to a modern, resilient, cloud-based platform. These new funds will be dedicated to removing the legacy restraints imposed on our budget and allow for spending directed toward more economical and useful resources.

Question 10. What are the 10 highest priority IT investment projects that are under development in your agency? Of these, which ones are being developed using an "agile" or incremental approach, such as delivering working functionality in smaller increments and completing initial deployment to end-users in short, six-month time frames?

Answer. We have very modest IT investment projects compared to most other agencies and are currently utilizing reprogrammed funds to support a server move. Our FY16 budget outlines the remainder of our specific priorities: $5.8 million to replace the FCC's legacy infrastructure with a managed IT Service provider, as well as one-time infusions of $9.6 million to rewrite the FCC's legacy applications as part

of a modular "shift" to a modern, resilient, cloud-based platform. We also have asked for $2.2 million to improve the resiliency of the FCC systems, specifically to address gaps identified in our recent FISMA audit process.

At present, the development of a replacement for our ECFS (or "comments") system is an important example of the continued use of agile development. This project, from start to finish, will take less than six months and uses entirely agile techniques. The ZenDesk deployment took less than 90 days and our new tracking tool will be developed in a similar manner, using either PaaS or SaaS, involving no on-site hardware or software and supported fully in the cloud.

Our move to "O365" is a top-ten priority—but it does not involve development, just moving our Microsoft infrastructure to a true cloud environment. Our highest priority development efforts are mostly centered on incentive auctions and licensing systems. These upgrades are a stop-gap measure until funding is made available for fundamental rewrites of those systems into a true cloud infrastructure, fully utilizing the agile approach

Question 11. To ensure that steady state investments continue to meet agency needs, OMB has a longstanding policy for agencies to annually review, evaluate, and report on their legacy IT infrastructure through Operational Assessments. What Operational Assessments have you conducted and what were the results?

Answer. We determined last year that we had 207 legacy systems, mostly unsupportable going forward. As a result, we developed a long-term IT modernization plan that is reflected in our Fiscal Year 2016 budget. Our Fiscal Year 2016 budget requests $5.8 million to replace the FCC's legacy infrastructure with a managed IT Service provider, as well as one-time infusions of $9.6 million to rewrite the FCC's legacy applications as part of a modular "shift" to a modern, resilient, cloud-based platform. A rationalization process for all systems and applications is ongoing as part of our effort to reduce the overall cost and complexity of FCC systems. The initial results reflected almost a 50 percent reduction in the number of "systems" to be modernized and a significant reduction in active servers.

Question 12. What are the 10 oldest IT systems or infrastructures in your agency? How old are they? Would it be cost-effective to replace them with newer IT investments?

Answer. The FCC has identified the legacy system issue as a core impediment to agency efficiency and a major contributor to overpriced maintenance costs. It would be more cost-effective to replace these systems with newer IT investments and we are moving in this direction. The development of the new Consumer Complaint Database is an example of this work.

I have been advised by our IT staff that examples of our oldest applications include: GenMen, ULS, CDBS, ECFS, ELS, ETFS, EDOCS, EMTS and PAMS. Aging Infrastructure includes: E25K, V490 servers, UPS units in Auctions computer room, Core Routers and the Distribution Switches as well as our SAN. The age of these applications and infrastructure is broad, but mostly falls into the over 10 year range with some probably approaching 20 years.

It is more cost effective to rewrite the applications into a cloud infrastructure versus replacing the equipment. The initial estimate for just modernizing the applications in the way the FCC has been doing business for the past two decades would mean rewriting applications in antiquated code on old platforms in a waterfall approach with an estimate of over $22 million, not including upgrading all of the hardware. Further, that traditional approach is not conducive to short term results through agile development, which significantly reduces our exposure and allows us to adapt quickly to congressional and regulatory requirements. Our request reflects a 50 percent cost avoidance on the development effort alone without even addressing cost avoidance on the hardware.

Question 13. How does your agency's IT governance process allow for your agency to terminate or "off ramp" IT investments that are critically over budget, over schedule, or failing to meet performance goals? Similarly, how does your agency's IT governance process allow for your agency to replace or "on-ramp" new solutions after terminating a failing IT investment?

Answer. We are currently in the process of implementing a long-term modernization effort. We do not have issues and problems related to over-budget, over-schedule or related issues due in part to a lack of investment in future needs. Our IT governance process, managed through OMD, allows for a fast turn-around through direct contact and discussion with the CFO and Managing Director. We have a rigorous investment review process for all new development and have instituted a review of all O&M and development efforts.

Question 14. What IT projects has your agency decommissioned in the last year? What are your agency's plans to decommission IT projects this year?

Answer. We have not decommissioned any IT projects, but did replace the Consumer Complaints Database system. Because of flat appropriations and not having significant new IT projects funded other than auctions, our entire focus has been on O&M for existing systems. We were compelled to halt improvements and upgrades to the Broadband Map this year due to funding restraints.

Question 15. The newly-enacted Federal Information Technology and Acquisition Reform Act of 2014 (FITARA, PL 113–291) directs CIOs to conduct annual reviews of their agency/department's IT portfolio. Please describe your agency/department's efforts to identify and reduce wasteful, low-value or duplicative information technology (IT) investments as part of these portfolio reviews.

Answer. In February 2014, the FCC conducted a top-to-bottom review of its internal processes and determined that IT systems at the agency were in serious need of modernization. Since that time, we have been actively engaged in modernizing the remaining portion of the 207 legacy systems and creating integrated systems similar to the Consumer Complaint Database.

The CIO's recommendations on the IT portfolio review are clearly highlighted in our Fiscal Year 2016 Budget request: $5.8 million to replace the FCC's legacy infrastructure with a managed IT Service provider, as well as one-time infusions of $9.6 million to rewrite the FCC's legacy applications as part of a modular "shift" to a modern, resilient, cloud-based platform. We also have asked for $2.2 million to improve the resiliency of the FCC systems, specifically to address gaps identified in our recent FISMA audit process.

Question 16. In 2011, the Office of Management and Budget (OMB) issued a "Cloud First" policy that required agency Chief Information Officers to implement a cloud-based service whenever there was a secure, reliable, and cost-effective option. How many of the agency/department's IT investments are cloud-based services (Infrastructure as a Service, Platform as a Service, Software as a Service, etc.)? What percentage of the agency/department's overall IT investments are cloud-based services? How has this changed since 2011?

Answer. The FCC currently is planning to move to cloud-based system. Beyond the move of Microsoft products to 0365, which is a full cloud-based deployment, lack of funding will limit our ability to re-write our applications in to a cloud infrastructure. We currently have several examples of our ongoing initiative to move systems to the cloud, including: ZenDesk, Relativity, Mule API Manager, box.com, Google Apps for Government, Amazon Web Services, Appian, and CenturyLink for website deployment. We also are planning for several more, including; Azure, SoftLayer, Office365, Incentive Auction, ISAS Bidding system, BPM using ServiceNow and IdaaS using Okta. Please note that these involve only partial deployments in most instances. ZenDesk is a full cloud implementation like O365.

Question 17. Provide short summaries of three recent IT program successes—projects that were delivered on time, within budget, and delivered the promised functionality and benefits to the end user. How does your agency define "success" in IT program management? What "best practices" have emerged and been adopted from these recent IT program successes? What have proven to be the most significant barriers encountered to more common or frequent IT program successes?

Answer. Earlier this year, the FCC launched a new Consumer Help Center with a revamped complaint web interface at about 1/6th the traditional cost for such a project. This project epitomizes many of the agency-wide changes that we hope to implement for IT: inexpensive, off-the-shelf solutions, combined with resiliency, user-friendly options, and the potential to improve our internal data collection methods to increase transparency and inform policy-making decisions. The roll out of VDI remote access for Commission staff over the last year has made our agency more efficient and allowed for our workforce to be more mobile and office independent. The move to O365 also is a significant project with a fixed price and will be delivered on time and on budget. We also are updating our Electronic Comment Filing System (ECFS), our 20-year old comments database, which showed strain during the Open Internet proceeding. Completion is targeted within the next month.

Unfortunately, lack of funding has undermined additional system development projects. On April 6, 2015, we did sign a contract to move our server off-premises to a secure Federal cluster site in West Virginia, and that project is underway. The Commission has made progress on moving to electronic filing and distribution of licenses for most matters, and we would like to develop a process for including the remainder, with sufficient funding.

In addition, OMD is working hard on improving the searchability, navigability and appearance of the FCC's external website; improvements in search functionality should be seen within the next month, if not earlier. Improving usability and appearance has involved input from FCC.gov stakeholders internally and externally.

The status of the FCC.gov upgrade project is described in a recent blog post by the FCC's CIO: *www.fcc.gov/blog/modernizing-fccgov-website.*

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DAN SULLIVAN TO HON. TOM WHEELER

Question 1. Chairman Wheeler, thank you for visiting Alaska last August. Since your visit, the Alaska Telephone Association has authored a plan, the "Consensus Alaska Plan," which would allow them to provide broadband to unserved areas and improve service throughout Alaska. 16 Alaskan companies have signed on to the plan. What are your thoughts on the Consensus Alaska Plan?

Answer. The Commission has long recognized the unique challenges of deploying broadband to remote areas of Alaska. We welcome industry input and will consider the plan presented by the Alaskan companies as the Commission considers reforms to the high-cost mechanisms that support voice and broadband service provided by rate-of-return carriers, as well as support for mobile carriers.

Question 2. Chairman Wheeler, in November, President Obama made clear that he believed the FCC should reclassify broadband under Title II of the Telecommunications Act. Soon after, you changed your position on net neutrality, aligning it with the President's position. Please address the legality of a president influencing the actions of an independent agency.

Answer. The process the FCC followed to develop the Open Internet Order was the informal rulemaking process established in Section 553 of the Administrative Procedure Act. Interested parties can participate in this process by submitting comments into the rulemaking record or by making *ex parte* presentations to FCC Commissioners and staff. Executive branch officials, including the President, can and do participate in these FCC rulemaking proceedings. The Department of Justice Office of Legal Counsel found in a 1991 opinion requested by the George H.W. Bush Administration that "it is permissible for White House officials to contact FCC Commissioners in an effort to influence the results of an FCC rulemaking," subject to the Commission's disclosure rules.[1]

On November 10, 2014, President Obama issued a video and a written statement calling for the creation of "a new set of rules protecting net neutrality." His statement became part of the Open Internet rulemaking record later the same day, when the National Telecommunications and Information Administration filed the President's statement and a notice of an *ex parte* presentation in the proceeding record. President Obama was one of many commenters—including many Members of Congress—who supported a Title II reclassification approach.

Question 3. In the future, there is the possibility that Congress will attempt to rewrite the Communications Act. The last major overhaul of your original authorizing legislation was the Telecommunications Act of 1996. In that Act, Congress was very clear that expansion of advanced telecommunications services to rural Americans was a priority. The Act established the Universal Service Fund as a way of implementing that priority, stating that congressional intent was that funding be "sufficient" to allow infrastructure to be built to remote, sparsely populated areas and that the funding be "predictable" so that companies providing the infrastructure can take on necessary debt with a reasonable expectation that they will be able to maintain their debt coverage. Do you agree that the principle of universal service, which has long been a guiding principle of the Federal Government, should continue to be a priority in any new legislation?

Answer. As I have made clear since the day I arrived at the Commission, universal service is one of the core elements of the network compact that exists between the companies that provide the service and the public. Congress has enshrined this value in the Communications Act, and achieving universal service is a goal that must guide the work of the FCC in all that we do. Simply put, access denied is opportunity denied.

Question 4. The FCC is now examining additional ideas for expanding broadband capability in unserved areas. For Alaska, one of the biggest obstacles to closing the broadband availability gap is ensuring that all Alaska service providers have access to middle-mile capability at reasonable rates. Will you commit to work on closing the broadband availability gap in Alaska?

Answer. I understand the challenges to providing reasonably comparable broadband to end-users presented by the current middle-mile options in many parts of Alaska. The most remote, highest-cost areas may take longer to reach than other

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[1] 15 U.S. Op. Off. Legal Counsel 1, 3 (1991).

areas, but any long-term solution for Alaska must include addressing the middle-mile capabilities. I am heartened by news that there is some progress by the private sector to upgrade existing middle-mile capabilities and create new ones.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DEAN HELLER TO HON. TOM WHEELER

Question 1. Understanding the complexity of the incentive auction, what is the current timeline for when the incentive auction is expected to take place? Is there any way we can push up the timeline?

Answer. The Commission adopted the Incentive Auction Report and Order in May 2014, establishing the basic policies and rules for the auction. Since then, the Commission has moved forward on numerous fronts to address the range of auction implementation issues. We are on track to accept applications in the fall of this year and to conduct the Incentive Auction beginning in the first quarter of 2016. That schedule gives us the time we need to complete work on the auction procedures and related polices, and ensure that the auction software will run seamlessly.

Question 1a. Are there any other spectrum auctions that the FCC is planning on conducting before the authorization runs out in 2022? If so, what are they? At what point in the process are they in? What can I do to be helpful to bring more spectrum to auction?

Answer. The Commission is committed to making additional licensed and unlicensed spectrum available for broadband and continues to rely on its auction authority to use market-based mechanisms to accomplish that goal. Auctions are a crucial tool in our tool belt that we have regularly used to make commercial wireless spectrum available to us since the authority was originally granted to us by Congress in 1993.

The Commission has a number of commercial wireless auctions in the pipeline, in addition to the Incentive Auction. We also need to maintain the ability to auction spectrum into the future, including for bands not yet identified, so that when they are identified, we can move as quickly as possible to make the spectrum available in the marketplace.

For instance, in April 2015 the Commission adopted the 3.5 GHz Report and Order, which establishes an innovative three-tiered sharing framework to create a 150-megahertz band of spectrum that, among other innovative spectrum sharing concepts, envisions periodic auctions occurring every three years (3.5 GHz Auctions). In the recurring 3.5 GHz Auctions, up to 70 megahertz will be available on a licensed basis.

In addition, the Commission recently initiated a proceeding to identify spectrum in a number of bands above 24 GHz that could be harnessed for mobile services, including what some refer to as "5G." The Commission sought comment on how these bands could be made available for mobile broadband and other uses, including through auction. The Commission also periodically holds auctions for spectrum that is in our inventory, including spectrum for which there was not a winning bidder in previous auctions.

I appreciate your offer for assistance in identifying additional spectrum that could be made available for auction, and look forward to working with you to achieve our mutual goals.

Question 2. I believe that FCC Process reform is long overdue. Do you believe that we can make simple changes to the rulemaking process at the FCC that would create more transparency? Do you believe that we should codify the rulemaking process? Do you believe a proposed rule or amendment to a rule should be published for at least 21 days? If you do not believe that we should publish a proposed rule or amendment for at least 21 days do you believe it should be published before the vote at all?

Answer. The FCC rulemaking process is governed by statute through the Administrative Procedure Act.[1] The APA applies to all independent agencies' rulemaking proceedings, and establishes a well-understood, transparent process that has stood the test of time. APA provides for public notice and comment cycles, *ex parte* rules, and reconsideration/appeals—ample opportunity for the public to participate, which enables decisionmaking to proceed in an orderly and fair fashion.

Releasing the text of a draft order in advance of a Commission vote effectively re-opens the comment period and can result in a never-ending proceeding. The APA requires agencies engaged in notice-and-comment rulemaking to consider the com-

[1] 5 USC 551 et seq.

ments in the record of a proceeding before reaching a decision. Publicly releasing a draft order before adoption would create the opportunity for additional public comment, which would have to be addressed under the APA. Addressing new round of public comments on matters already fully subject to public comment could result in a new draft order that is substantially different from the original, which in turn could lead to another public comment period (and another if a new draft order were released in response to subsequent public comment). In short, requiring the release of a draft order prior to its adoption could jeopardize the FCC's ability to conclude rulemakings in a timely fashion.

Question 3. Would you please propose one regulation that we should eliminate?

Answer. The Report on FCC Process Reform, released on February 14, 2014 after a comprehensive review by a staff working group, recommended several regulations that should be eliminated. Commission staff is working diligently to implement these and other recommendations from the report. Here are a few examples of regulations that the Commission either has recently, or proposes should be, eliminated:

In the last year, the Commission eliminated over 20 rules relating to wireless services in an effort to reduce and minimize regulatory burdens and streamline its rules. Specifically, rules were eliminated to modernize the amateur licensing process, significantly reform and modernize the cellular service rules, and improve and streamline rules and requirements for wireless infrastructure.

On the media front, last September the Commission repealed its sports blackout rules, which prohibited cable and satellite operators from airing any sports event that had been blacked out on a local broadcast station. That action removed Commission protection of the NFL's private blackout policy, which requires local broadcast stations to black out a game if a team does not sell a certain percentage of tickets to the game at least 72 hours prior to the game. In revisiting the rules, the Commission determined that the rules were no longer justified in light of the significant changes in the sports industry since these rules were first adopted nearly forty years ago.

Last November, the Commission unanimously adopted a Notice of Proposed Rulemaking that would update the contest rules. In the item, the Commission proposed to end the mandate that broadcasters disclose contest information fully and accurately over the air, instead proposing to allow stations to refer consumers to detailed contest information available on a website. We expect to move forward with a rulemaking on this issue this year.

In the equipment certification context, a Notice of Proposed Rulemaking is on circulation now that would propose to eliminate the requirement to file an importation Form 740 for each entry of electronic and communications equipment, which would ease the burden for equipment manufacturers. In addition, the NPRM proposes to combine the Declaration of Conformity and Verification procedures into one self-approval program that is essentially identical to programs used in other parts of the world, streamlining the equipment certification process.

In February 2015, new rules went into effect that eliminated unnecessary international reporting requirements in Part 43 of the Commission's rules. In addition, there is a Further Notice of Proposed Rulemaking pending—which we expect to complete later this year—that proposes to eliminate most or all of the interim design and construction milestone showings currently required of geostationary orbit satellite system licensees.

In an order adopted in October 2014, the Commission eliminated the requirement that 700 MHz public safety licensees narrowband their systems from 12.5 kHz to 6.25 kHz channels by December 31, 2016. The Commission concluded that the narrowbanding requirement was unnecessary because it limited the technical flexibility of licensees to use newer technologies (such as broadband) and would impose unnecessary costs without corresponding benefits. In addition, in an NPRM adopted in April 2015, the Commission proposed to sunset the requirement to transmit 911 calls from non-service initialized (NSI) phones following a six-month transition period. The Commission proposed to sunset the rule because NSI phones are a frequent source of harassing and fraudulent 911 calls and because alternative means of accessing 911 are widely available.

In the last year, the Commission eliminated the technology plan requirement and the prohibition on WAN ownership in the E-rate program. In addition, there is an NPRM currently pending that would propose to eliminate rules from which the Commission has granted unconditional forbearance for all carriers, and also proposes to remove references to "telegraph" from certain sections of the Commission's rules.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARIA CANTWELL TO HON. TOM WHEELER

Question 1. The Commission's actions on Net Neutrality go a long way to ensuring an open and vibrant Internet that protects consumers and promotes innovation for many years to come. I know that you faced some strong headwinds in taking that action and, like many of my colleagues, I'm pleased that you all had the courage to take that step.

As we now look ahead, I know you are looking to review some of the larger mergers that are next on your agenda. One of those mergers in particular, the combination of Comcast and Time Warner Cable, seems particularly troubling. As I understand it, the resulting company would control more than half of the broadband connections in our country.

At the same time, it would own enormous amount of content, become the dominant cable and broadband company in nearly every major market, and have significant sway over cable advertising. Just as we are entering an exciting new period where our most popular content brands like Netflix, Amazon, ESPN, Nickelodeon and HBO are available "over the top" or soon will be, one company that competes directly against them will also control the pipe that determines their fate.

Question 1a. I'd like your perspective on the potential impact that market consolidation generally could have on competition especially in the area of content pricing and availability and your commitment to give the merger transactions pending in front of the FCC a very thorough review.

Answer. With regard to your first point, as you may know, my mantra since becoming Chairman has been "competition, competition, competition" and I have been dedicated to promoting that goal. Last fall I announced a new Agenda for Broadband Competition, noting that competition is the most effective tool for driving innovation, investment, and consumer and economic benefits. The Agenda is a set of policy goals that are broadly applicable as the marketplace continues to evolve. I pledged that (1) where competition exists, the Commission will protect it; (2) where greater competition can exist, we will encourage it; (3) where meaningful competition is not available, we will work to create it; and (4) where competition cannot be expected to exist, we must shoulder the responsibility of promoting the deployment of broadband.

With respect to the proposed merger between AT&T and DIRECTV, the Commission continues to conduct a detailed and comprehensive review, including consideration of the competition issues that you raise.

On April 24, Comcast announced its decision to abandon its bid to acquire Time Warner Cable.

Question 2. Some in the industry have called for a premium on getting the incentive auction "right" over rushing to just get it "done." I think American consumers and innovators deserve both. At the hearing Chairman Wheeler and Commissioner Pai both spoke to the complexities involved in moving forward with this auction as possible reasons for delay.

Question 2a. Does the FCC have the expertise, personnel and technology resources to complete the auction without a further delay?

Question 2b. If not, what additional resources are needed and are these needs accounted for in the FCC budget request that covers the time period during which the auction is expected to be conducted?

Answer. Yes. The FCC received its requested auctions cap in its Fiscal Year 2013, 2014 and 2015 Appropriations bills. The FCC has requested an $11 million increase in the auctions cap for Fiscal Year 2016, from $106 million to $117 million. If we receive the requested level, along with our overall budget request of $388 million for Fiscal Year 2016, we will have sufficient funds to move ahead.

Question 3. Late last year, I sent you a letter raising issues about universal service reforms and encouraging you to consult more directly with the Tribal communities before you move forward with reforming universal service fund programs that could address some of the service gaps on tribal lands.

In February 2015, the National Congress of American Indians filed a petition for reconsideration complaining that the FCC adopted reforms that will drain $900,000 annually from tribally-owned carriers serving tribal lands and that it reached that decision without engaging in formal consultation with the tribal nations with regard to these reforms. The cost of the underlying decision threatens to have a dramatic impact on carriers serving tribal lands. You have acknowledged the special challenges to bringing advanced networks to tribal lands.

Question 3a. Couldn't a more robust consultation with the tribes have led the FCC to consider a tribal tailored approach in reaching its decision?

Question 3b. What plans does the FCC have to address the growing digital divide on tribal lands?

Question 3c. When does the FCC plan to resolve the NCAI petition for reconsideration?

Answer. The Commission is strongly committed to working with Tribal Nations to ensure that Tribal concerns are appropriately considered and addressed as part of the Commission's broader efforts to improve broadband deployment throughout the United States. Expanding high speed broadband connections to all corners of the country, including Tribal lands, is a top priority for the Commission.

In general, the Commission is strongly committed to working with Tribal Nations through meaningful and vigorous efforts on a regular basis. ONAP has renewed its commitment to Tribal consultation, training, and outreach, and the Commission's comprehensive and regional approach has proven unique among Federal agencies. With ONAP's leadership, for example, the Commission has forged partnerships with Tribal Nations and inter-Tribal government associations to ensure that the well-received Tribal Broadband, Telecom, and Media Consultation and Training Workshops meet the individual needs of their regions across Indian Country. The Commission, through ONAP, hosts these regional events for Tribal Nations, and at no cost to attendees.

Basic key communications issues are covered at all of the workshops, including universal service, spectrum, and broadcast. In 2014, the Commission committed to upgrade and expand its Tribal consultation and training efforts, launching a more intensive version of the workshops. Each of the 2 ½ day workshops was held in Indian Country or, in one case, in a location requested by one of our Tribal partners. These locations included Tribal lands in California, Idaho, Minnesota, and Oklahoma, as well as the Southeast region central City of Nashville. And each of the workshops had a common goal—to train and assist Tribal Nations in developing more robust broadband, telecommunications, and broadcast infrastructure to serve those living on Tribal lands. The workshops also were coupled with deployment of the Native Learning Lab, a modular teaching tool developed for in-depth educational sessions at computer stations.

The evolution of the Commission's approach to Tribal engagement is also an iterative process. While we have made significant steps forward over the years, much remains to be done. Developing separate tracks in consultations and training—with sessions geared toward those new to communications issues and sessions geared to those with more advanced knowledge—are in the planning stages for 2015 and beyond. Holding workshops in regions and locations in Indian County that have not yet hosted a regional workshop is another priority. ONAP is presently targeting the Northwest, North Plains, Alaska, Southwest, and Southern Plains regions.

In addition, building upon the very successful Tribal E-rate training workshop held at the Santa Fe Indian School last November, the Commission and the Universal Service Administrative Company are planning, among other things, a series of four or five such trainings across Indian Country in 2015. We are working with our inter-Tribal government organization and Indian education partners to plan those sessions in conjunction with, for example, other Tribal meetings or gatherings and/or other Commission Tribal consultation and training workshops in locations proximate to significant numbers of Tribal Nations and in locations that involve low travel costs for attendees. The FCC is constantly looking to build upon the successes of its approach, always in consultation and coordination with Tribal Nations across Indian Country.

In the recent *December 2014 Connect America Order,* the Commission revised the High-Cost Loop Support (HCLS) mechanism to distribute high-cost support more equitably among high-cost carriers in order to provide better incentives for carriers to curb waste, as it had proposed to do in April 2014. This is a near-term reform intended to help us get the most out of our USF dollars. This decision was built on an extensive record on the proposal, including comments from rural carriers and their representatives, and published Commission staff analysis of the effects of the revision. We believe it is important to move forward with implementation of this mechanism to ensure that universal service funds are being used as cost effectively and efficiently as possible. We will closely monitor the effects of the interim HCLS mechanism on rate-of-return carriers, particularly those that serve Indian Country, and we will revisit this issue in the event that it has unanticipated results.

With regard to the National Congress of American Indians' petition for reconsideration of the *December 2014 Connect America Order,* the Commission will give the petition full consideration and will act on it after it has been given the full and complete analysis that is necessary to reach a decision.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. CORY BOOKER TO HON. TOM WHEELER

Question 1. As you know, the television station WWOR has a special obligation to serve the citizens of the state of New Jersey. New Jersey is consumed by two out of state media markets, New York and Philadelphia, and thus the citizens of New Jersey face unique challenges to accessing local broadcast TV. I understand that some of my constituents have raised complaints through the appropriate process at the FCC, but have come back empty handed. I also understand that questions have been raised regarding the procedures involved in the case. Specifically, one issue raised through a petition filed by Voices of New Jersey took seven years to review.

Question 1a. What can be done in the future to ensure that television licenses, which are assigned for terms of 8 years, do not take nearly that long to review for renewal?

Answer. I understand your concern regarding the length of time it took to resolve the license renewal for WWOR–TV. As you know, since becoming Chairman, I have made it a priority to reduce the backlog of pending matters within the Bureaus. Each license renewal application must be reviewed individually to determine if the station operated in the public interest over the prior license term. In cases where Petitions to Deny are filed against renewal applications, the process can take longer, but I agree that such reviews should not take over seven years to complete. In August 2014, less than a year after my the beginning of my tenure at the Commission, a Bureau-level decision was issued with respect to WWOR license renewals for terms ending in 2007 and in 2014. An Application for Review addressing both license renewals was filed last fall and is currently under review.

Question 1b. How long do you anticipate the current WWOR proceeding will take at the Commission?

Answer. WWOR–TV filed its latest renewal application on February 3, 2015, with Petitions to Deny due by May 1, 2015. With regard to the grant of the renewal for the license term that ended in 2007, I understand that an Application for Review was timely filed last fall, and the Media Bureau is actively working on recommendations for the full Commission's consideration.

Question 2. WWOR is permitted to own two television stations and two newspapers in the New York media market, despite the Commission's own rules that prevent this kind of media cross-ownership. The media ownership rules are in place to promote competition, diversity of voices, and localism in the media.

Question 2a. What is your response regarding this matter?

Answer. Fox Television Stations, Inc. is allowed to own WNYW–TV, WWOR–TV and the New York Post in the country's largest media market, under a temporary waiver granted by the Media Bureau in August 2014, pending the outcome of the 2014 Quadrennial Review of the broadcast ownership rules. The Media Bureau's decision to grant the temporary waiver currently is subject to the pending Application for Review. It is important to note that ownership of the Wall Street Journal is not implicated by our rules, as the newspaper is considered a national newspaper, as opposed to a local newspaper.

Question 2b. How can we work together to ensure these values remain intact in the changing media landscape?

Answer. Please be assured that I take seriously the responsibilities to ensure that the goals to promote competition, diversity of voices, and localism are at the forefront as we navigate the issues facing the video marketplace in the 21st century. I encourage you and your constituents to participate in our pending 2014 Quadrennial Review so that the Commission has an ample record on which to make its policy decisions.

Question 3. As mayor of Newark, I saw firsthand how critical local governments are to finding innovative solutions to the unique challenges they face. When it comes to broadband deployment, you don't have to look far to notice the inadequacies that exist in low-income communities and rural areas. In communities with no broadband, slow broadband, or few options to choose from to improve their connectivity, municipal broadband can be a useful tool in connecting communities. In January, I introduced the Community Broadband Act to preserve the rights of local governments to invest in broadband networks should they so choose. I was pleased with the FCC's recent action to grant the petitions of North Carolina and Tennessee which sought waivers freeing them from burdensome state regulations that tied their hands and prevented them from investing in municipal networks. While the FCC's action was a critically important step in the right direction, I think

we can still do more to reduce the burdens on local governments and protect their freedom to innovate.

Question 3a. Do you agree that legislation would help ensure that communities have the right to invest in their own broadband networks?

Answer. I share your commitment to ensuring that all Americans have access to high quality broadband in light of its importance to driving innovation, investment, and consumer and economic benefits. Section 706 of the Telecommunications Act of 1996 mandates that the Commission encourage broadband deployment and take immediate action to remove barriers to infrastructure investment and promote competition when advanced broadband is not being deployed to all Americans in a reasonable and timely fashion.

In our February 26, 2015, decision, the Commission found that certain statutory provisions in the North Carolina and Tennessee statutes constituted barriers to broadband infrastructure investment and competition, and we preempted those provisions pursuant to our authority under section 706. This action was taken in response to petitions for preemption filed by the City of Wilson, North Carolina (Wilson) and the Electric Power Board of Chattanooga, Tennessee (EPB).

The Commission's decision to preempt does not preempt restrictive laws with respect to municipal broadband in other states. However, the decision does establish a precedent for reviewing similar laws in other states, and the *Order* stated that the agency would not hesitate to preempt other, similar state laws if those laws constitute barriers to broadband deployment.

Should Congress desire to enact legislation such as you have described, the Commission would provide technical assistance where requested and appropriate.

Question 3b. How do you see municipal broadband helping communities that currently struggle to find affordable, reliable broadband?

Answer. Broadband deployment is critically important to local communities and the people who live and work in them. In areas where there is no other provider, community broadband deployment helps to connect those communities to the 21st century network and all the benefits that come along with that connectivity. In areas where there may be an incumbent that is not delivering the kind of broadband that is sufficient to meet the community's needs, community broadband deployment can bring much needed competition, encouraging further investment and innovation. As I told NATOA last October, "Local choice and competition are about as American as you can get."

In our February 26, 2015 decision to preempt statutory provisions restricting municipal broadband in Tennessee and North Carolina, the Commission found that preemption of the laws at issue would likely lead to increased overall broadband infrastructure investment and promote overall broadband competition in those states. In particular, the record in the proceeding demonstrated that "community broadband solutions in Tennessee and North Carolina such as EPB and Wilson have played and will continue to play a critical role by providing service where market failures are occurring or policy goals related to broadband deployment are not being met and where private providers may have little incentive to invest. This enhances overall broadband deployment and competition in Tennessee and North Carolina." Moreover, the Commission found that private sector providers in the areas served by EPB and Wilson demonstrated a "pattern of positive competitive responses" by stabilizing broadband rates and improving service.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO HON. TOM WHEELER

Question 1. Broadband is a critical challenge. Those without Internet access are missing out on more than video streaming and e-mail. They are increasingly missing out on opportunities to fully take part in a society that is moving more and more of its communications and interactions onto the Internet. According to FCC data, more than 630,000 New Mexicans or thirty percent of our state's population lack access to fixed broadband speeds of 25 megabits per second. In rural areas of the state, seventy-seven percent lack such access to fast broadband. Nationwide, rural Americans are 13 times more likely to lack access to broadband than Americans in urban areas. So I am paying close attention to reforms to the Universal Service Fund. It is vital that these reforms succeed, especially in rural areas.

Question 1a. How will the FCC continue to advance reforms to ensure that unserved areas are targeted for broadband support?

Question 1b. How will the FCC balance the need to connect areas with no broadband service, while upgrading areas with slow service?

Answer. I agree that high-speed broadband access is an essential component for economic growth in rural areas in states such as New Mexico. As you know, the deployment of broadband is a powerful platform that encourages economic growth and facilitates improvements in education, health care, public safety, and other key policy areas. That is why expanding high-speed broadband connections to all corners of the country is a top priority for the Commission.

Last December, the Commission adopted a *Connect America Fund Phase II Report and Order* to move forward with Connect America for price-cap carriers. In Connect America Phase II, the Commission will offer cost model-calculated support to price cap carriers in high-cost areas that are not served by an unsubsidized facilities-based provider of residential voice and broadband service. Importantly, the Order raises the minimum broadband speed carriers are required to deploy from 4 Mbps to 10 Mbps, consistent with our statutory obligation to ensure that rural Americans have access to services that are reasonably comparable to those available to their urban and suburban neighbors.

This year we will adopt the rules and requirements that will apply to the competitive bidding process that will help close gaps where large incumbent providers won't commit to extending broadband in a given state. No rural area should fall through the cracks. A primary policy goal for the competitive bidding process is to ensure that there is widespread participation from all providers that can deliver high-quality service, thereby providing the most efficient use of limited USF dollars.

Additionally, my fellow Commissioners and I have committed to act on reforming the USF support mechanisms for rate-of-return carriers in the coming year to ensure that we are delivering the best possible voice and broadband experiences to rural areas within the confines of our Connect America budget, while providing increased certainty and predictability for all carriers and a climate for increased broadband expansion. We have already amended our support mechanism to ensure more carriers in rural areas get support. I look forward to working with my fellow Commissioners, industry stakeholders, as well as you and your colleagues, to develop a solution that meets our common goal of ensuring that all Americans have access to robust voice and broadband services.

Question 2. Chairman Wheeler, I want to thank you for your commitment to consultation and outreach to Tribes. One recent example was an E-Rate workshop held at the Santa Fe Indian School. This outreach is an example of how the FCC Office of Native Affairs and Policy (ONAP) can help the FCC tackle the digital divide facing Native American communities. In New Mexico, 89 percent of those living on Tribal lands do not even have access to fast broadband speeds. Nationwide, broadband adoption rates for those on Tribal lands may be as low as 10 percent.

Question 2a. Will you assure me that the FCC will prioritize tackling the digital divide in Indian country?

Answer. The Commission is strongly committed to working with Tribal Nations through meaningful and vigorous efforts on a regular basis. ONAP has renewed its commitment to Tribal consultation, training, and outreach, and the Commission's comprehensive and regional approach has proven unique among Federal agencies. With ONAP's leadership, for example, the Commission has forged partnerships with Tribal Nations and inter-Tribal government associations to ensure that the well-received Tribal Broadband, Telecom, and Media Consultation and Training Workshops meet the individual needs of their regions across Indian Country. The Commission, through ONAP, hosts these regional events for Tribal Nations, and at no cost to attendees.

Basic key communications issues are covered at all of the workshops, including universal service, spectrum, and broadcast. In 2014, the Commission committed to upgrade and expand its Tribal consultation and training efforts, launching a more intensive version of the workshops. Each of the 2 ½ day workshops was held in Indian Country or, in one case, in a location requested by one of our Tribal partners. These locations included Tribal lands in California, Idaho, Minnesota, and Oklahoma, as well as the Southeast region central City of Nashville. And each of the workshops had a common goal—to train and assist Tribal Nations in developing more robust broadband, telecommunications, and broadcast infrastructure to serve those living on Tribal lands. The workshops also were coupled with deployment of the Native Learning Lab, a modular teaching tool developed for in-depth educational sessions at computer stations.

The evolution of the Commission's approach to Tribal engagement is also an iterative process. While we have made significant steps forward over the years, much remains to be done. Developing separate tracks in consultations and training—with sessions geared toward those new to communications issues and sessions geared to those with more advanced knowledge—are in the planning stages for 2015

and beyond. Holding workshops in regions and locations in Indian County that have not yet hosted a regional workshop is another priority. ONAP is presently targeting the Northwest, North Plains, Alaska, Southwest, and Southern Plains regions.

In addition, building upon the very successful Tribal E-rate training workshop held at the Santa Fe Indian School last November, the Commission and the Universal Service Administrative Company are planning, among other things, a series of four or five such trainings across Indian Country in 2015. We are working with our inter-Tribal government organization and Indian education partners to plan those sessions in conjunction with, for example, other Tribal meetings or gatherings and/or other Commission Tribal consultation and training workshops in locations proximate to significant numbers of Tribal Nations and in locations that involve low travel costs for attendees. The FCC is constantly looking to build upon the successes of its approach, always in consultation and coordination with Tribal Nations across Indian Country.

Question 2b. How does the FCC's FY16 budget request ensure that ONAP will have the resources it needs to help the FCC implement its existing policy on consultation with Tribes on a government to government basis?

Answer. If the Commission receives the funding level it has requested for its FY 2016 budget, those funds will be used to carry out the Commission's responsibilities, which includes the work of ONAP.

Question 3. I previously authored legislation to help wireless consumers avoid cell phone "bill shock" after inadvertently exceeding monthly usage limits. The Cell Phone Bill Shock Act would have required consumer alerts before going over monthly limits as well as prior customer consent before a cell phone company could charge any "overage" fees. This legislation was never enacted. Yet I believe it did help lead to the voluntary 2011 agreement by most major U.S. wireless carriers to provide free consumer usage alerts.

Question 3a. How well is the voluntary 2011 agreement working?

Question 3b. How many "bill shock" complaints has the FCC received since the agreement was announced?

Answer. In 2013, the Commission announced that approximately 97 percent of wireless customers across the Nation were now protected from bill shock as participating U.S. wireless companies had met an April 17, 2013 deadline to provide free, automatic usage-based alerts when they approach or exceed plan limits for data, voice, and text, or when they incur international roaming charges. At the same time, as part of its continuing consumer education mission, the FCC held a public *Consumer Workshop* to educate consumers about these and other ways they can protect themselves from bill shock.

Also, the FCC updated its *Bill Shock Web Portal* to give consumers at-a-glance status of carriers' reported compliance on bill shock alerts. (Visit the Web page at *FCC.gov/bill-shock-alerts.*) The Bill Shock Web Portal offers links to participating carrier websites, meeting commitments from the previous year's agreement with CTIA and Consumers Union to clearly disclose policies and tools regarding usage balances and alerts. The FCC's Consumer Empowerment Agenda focuses on harnessing technology and information to help consumers make informed decisions in the communications marketplace. The agency's Consumer Empowerment Agenda includes resources to help Americans protect themselves against bill shock, and other misleading or deceptive practices, along with greater openness and transparency efforts to make more data easily available to the public.

Since the April 17, 2013, deadline through the end of 2014 the Commission has received approximately 400 complaints, an average of just fewer than 20 complaints per month over that span, an approximately 60 percent drop from the average of 54 complaints per month for the two years prior to the alerts taking effect. For context, the Commission received roughly 16,000 complaints per month for unwanted calls and text messages over the same period. Thus, it is fair to say that less than 20 complaints per month is not a significant number of complaints to cause alarm and suggests the carriers are complying with sending the alerts. Of course, the Commission continues to closely monitor complaints, and the issue as a whole, in order to be sure that carriers continue to alert consumers about potential bill shock.

Question 4. Last year, you wrote to Verizon about your concerns that some features of wireless data plans seem to go beyond reasonable network management practices. Today, most consumers are accustomed to online access at home with a broadband subscription that allows unlimited access to data from the Internet. Yet many wireline and wireless Internet service providers are now experimenting with or implementing usage-based pricing and "data caps." Consumer groups have asked the Commission to collect information on how companies implement and administer such data caps. What steps has the Commission taken to do so?

Answer. I was deeply troubled by reports of providers slowing down speeds for selected customers who purchased "unlimited" data plans under the guise of "reasonable network management." I asked the major wireless carriers for more information about these practices, so that we can more closely examine whether these practices are consistent with the principles of an open Internet, including the requirement that ISPs provide accurate and timely disclosures of their practices.

As to whether data allowances and usage-based pricing plans more generally are appropriate, the *Open Internet Report and Order* noted that there is an unresolved debate concerning the benefits and drawbacks of these practices. As a result, we declined to make blanket findings about these practices and will address concerns under the no-unreasonable interference/disadvantage standard on a case-by-case basis. However, in the *Report and Order,* we also emphasized that providers must disclose usage allowances under the Transparency Rule to ensure consumers know exactly what is included in their pricing plans. The Commission will continue to closely monitor this issue, including future consumer complaints, to ensure that usage allowances do not adversely impact Internet openness.

Question 5. Chairman Wheeler, the Federal agency overseeing broadband providers and Internet policy should be a flagship agency when it comes to using the best IT tools available. Yet when record numbers of Americans tried to submit comments on net neutrality, the FCC's electronic filing system crashed. Last year, Senator Moran and I worked together to pass the Federal IT Acquisition Reform Act ("FITARA"). This will help Federal agencies save billions of taxpayer dollars. The FCC's new consumer complaints system is a good example of how IT reform should work. After Senator Nelson and I wrote to you asking for an online consumer complaints database, you created one that is much more functional than the old complaints web page. It was delivered in less than 6 months, for a cost of just $450,000. I want to encourage more of this type of "agile" IT reform.

Question 5a. How do you plan to prioritize the FCC's IT reform efforts moving forward?

Answer. We appreciate your work to pass FITARA—it will certainly drive necessary changes in the landscape of Federal Government IT. Thank you also for your recognition of our efforts at the FCC to move forward with more agile IT development designed to save millions of dollars and time in the delivery of services.

The cost for the startup of the Consumer Complaint Database system was approximately $352,000. Accordingly, the new system was 1/6th the traditional systems cost and was up and running less than 90 days after purchase. The system epitomizes many of the agency-wide changes that we hope to implement for IT: inexpensive, off-the-shelf solutions, combined with resiliency, user-friendly options, and the potential to improve our internal data collection methods to increase transparency and inform policy-making decisions. In every instance the FCC is looking toward the implementation of off-the-shelf solutions that are cloud based and require minimal configuration as the preferred solution(s) for our modernization.

Our FY16 budget outlines our specific priorities: $5.8 million to replace the FCC's legacy infrastructure with a managed IT Service provider, as well as one-time infusions of $9.6 million to rewrite the FCC's legacy applications as part of a modular "shift" to a modern, resilient, cloud-based platform. We also have asked for $2.2 million to improve the resiliency of the FCC systems, specifically to address gaps identified in our recent FISMA audit process.

Question 5b. What are the most important IT systems that need to be modernized?

Answer. In November 2014, the FCC received a reprogramming to apply $8.75 million to support initial IT upgrades. The first part of this process involves moving our servers off-premises to a shared Federal facility. We signed the contract for this essential effort on April 6, 2015. We also are continuing basic IT modernization projects and planning related to modernizing our 207 legacy systems. We will continue with the projects described above where funding is available.

The most urgent needs for modernization are within the core missions of the FCC: licensing and auctions. We also are well underway in rebuilding our Electronic Comment Filing System (ECFS) platform, which showed its age during the large-scale Open Internet rulemaking. It is the continuing goal of the FCC to provide platforms that support transparency, outreach and input as well as the other requirements of our constituent communities. Our core system for licensing, ULS, is at the top of our major system list for modernization, which in this case is a total re-write into a cloud infrastructure. None of this, however, will happen without receiving adequate funding.

Question 6. Describe the role of your department's Chief Information Officer (CIO) in the development and oversight of the IT budget for the FCC. How is the CIO

involved in the decision to make an IT investment, determine its scope, oversee its contract, and oversee continued operation and maintenance?

Answer. The FCC's CIO is situated within the Office of Managing Director and works directly with both the Managing Director and the Chief Financial Officer. The CIO provided significant input to determine the FCC's IT investment—which is reflected in the Fiscal Year 2016 budget. All requested programmatic funding increases, apart from the restacking/move of the FCC, are IT-based. We continue to strengthen the IT staff by hiring more experienced personnel, bringing in highly-skilled detailees from other agencies to oversee implementation, and decreasing the number of contractors. The IT department has "intrapreneurs" who work closely with each bureau and office assessing programming in order to (1) prioritize projects according to available funding; and (2) provide the necessary data for budgeting IT projects.

Question 7. Describe the existing authorities, organizational structure, and reporting relationship of the Chief Information Officer. While I am aware that the FCC is an independent agency, please note and explain any variance from that prescribed in the newly-enacted Federal Information Technology and Acquisition Reform Act of 2014 (FITARA, PL 113–291) for the above.

Answer. Although I am aware that OMB still must provide substantial guidance on agency implementation of the Act, the FCC was already moving in the right direction to ensure that our CIO had the support and level of responsibility contemplated by Congress. FITARA mandates a "significant role" in programming, budgeting and decision-making related to IT at their agencies, including approving the IT portion of the annual budget requests agencies submit to Congress. The FCC CIO clearly has this responsibility within the Commission.

The FCC's CIO works directly with the CFO and Managing Director to develop the budget, and he has access to enhanced procurement staff with an IT focus. Specifically, the CIO has implemented a cross-Commission perspective in order to replicate capabilities and reuse applications across the agency—a key component of FITARA. Strategic sourcing and consolidation also are key initiatives. The CIO has demonstrated the use of both of these initiatives in the Lift and Shift to a Federal data center and the use of Software as a Platform in his new initiatives.

In fact, the FCC has an outstanding CIO and we hope that by building his department and strengthening and empowering his staff, we will serve as a role model for IT good governance. In addition, our CIO has a good working relationship with the Federal CIO and is in step with efforts to modernize the approaches of the acquisition and implementation of IT in government.

Question 8. What formal or informal mechanisms exist at the FCC to ensure coordination and alignment within the CXO community (*i.e.,* the Chief Information Officer, the Managing Director, the FCC Bureau Chiefs, Chief Acquisition Officer, the Chief Finance Officer, the Chief Human Capital Officer, and so on)?

Answer. Given the compact nature of the FCC, the Office of Managing Director (OMD) coordinates and directs the office's staff, including the CFO and CIO. Also situated under OMD are human resources and procurement office personnel. The combination of these offices within OMD and the elevated status of the CIO in answering directly to the Managing Director have created an IT-centric focus that greatly benefits the Commission in long-term planning efforts.

The CIO also conducts regular briefings with the individual Bureau chiefs and deputies to inform them of upcoming IT related upgrades and changes. He also works closely with high level Commission staff to develop systems acquisitions requirements. The establishment of the "intrapreneur" designation ensures that highly qualified IT representatives are attached to each bureau and office and serve as their advocates and representatives.

Question 9. According to the Office of Personnel Management, 46 percent of the more than 80,000 Federal IT workers are 50 years of age or older, and more than 10 percent are 60 or older. Just four percent of the Federal IT workforce is under 30 years of age. Does FCC have such demographic imbalances? How is it addressing them?

Answer. The demographic probably is representative of all of the Federal Government, but the Commission does not consider an applicant's age when making hiring decisions. The FCC also is proud that its working environment encourages loyal staff and excellent retention of highly qualified personnel. During the past year, the FCC has endeavored to hire and retain qualified, skilled staff regardless of their age, including respected personnel detailed from other agencies. We believe that we need to maintain a fully staffed IT shop and decrease dependency on IT contractors. Until we receive essential funding, however, we will be unable to fully meet needed staffing levels.

Question 10. How much of the FCC's budget goes to Demonstration, Modernization, and Enhancement of IT systems as opposed to supporting existing and ongoing programs and infrastructure? How has this changed in the last five years?

Answer. The Government Accountability Office has noted that Federal agencies currently spend more than 70 percent of their IT budgets on maintaining legacy systems. The FCC, like other agencies, has been caught in this legacy trap; as of the end of FY13, we were trending well above even the Federal average of 70 percent. In fact, the FCC has trended as high as 80 percent for Operations and Maintenance (O&M) and this level actually increased during the past five years. A notable exception has been new auction system development to support the agency's mission and critical security upgrades.

We have tackled the problem of legacy systems head-on and targeted all available resources toward modernizing our IT systems. But we require additional funds to make this a reality, or risk maintaining high-cost, antiquated and inefficient systems. The FCC's Fiscal Year 2016 budget requests $5.8 million to replace the FCC's legacy infrastructure with a managed IT Service provider, as well as one-time infusions of $9.6 million to rewrite the FCC's legacy applications as part of a modular "shift" to a modern, resilient, cloud-based platform. These new funds will be dedicated to removing the legacy restraints imposed on our budget and allow for spending directed toward more economical and useful resources.

Question 11. What are the FCC's 10 highest priority IT investment projects that are under development? Of these, which ones are being developed using an "agile" or incremental approach, such as delivering working functionality in smaller increments and completing initial deployment to end-users in short, six-month time frames?

Answer. We have very modest IT investment projects compared to most other agencies and are currently utilizing reprogrammed funds to support a server move. Our FY16 budget outlines the remainder of our specific priorities: $5.8 million to replace the FCC's legacy infrastructure with a managed IT Service provider, as well as one-time infusions of $9.6 million to rewrite the FCC's legacy applications as part of a modular "shift" to a modern, resilient, cloud-based platform. We also have asked for $2.2 million to improve the resiliency of the FCC systems, specifically to address gaps identified in our recent FISMA audit process.

At present, the development of a replacement for our ECFS (or "comments") system is an important example of the continued use of agile development. This project, from start to finish, will take less than six months and use entirely agile techniques. The ZenDesk deployment took less than 90 days and our new tracking tool will be developed in a similar manner, using either PaaS or SaaS, involving no on-site hardware or software and supported fully in the cloud.

Our move to "O365" is a top-ten priority—but it does not involve development, just moving our Microsoft infrastructure to a true cloud environment. Our highest priority development efforts are mostly centered on incentive auctions and licensing systems. These upgrades are a stop-gap measure until funding is made available for fundamental rewrites of those systems into a true cloud infrastructure, fully utilizing the agile approach.

Question 12. To ensure that steady state investments continue to meet agency needs, OMB has a longstanding policy for agencies to annually review, evaluate, and report on their legacy IT infrastructure through Operational Assessments. Does FCC conduct such assessments or something equivalent to operational assessments? What assessments have you conducted and what were the results?

Answer. Yes. We determined last year that we had 207 legacy systems, mostly unsupportable going forward. As a result, we developed a long-term IT modernization plan that is reflected in our Fiscal Year 2016 budget. Our Fiscal Year 2016 budget requests $5.8 million to replace the FCC's legacy infrastructure with a managed IT Service provider, as well as one-time infusions of $9.6 million to rewrite the FCC's legacy applications as part of a modular "shift" to a modern, resilient, cloud-based platform. A rationalization process for all systems and applications is ongoing as part of our effort to reduce the overall cost and complexity of FCC systems. The initial results reflected almost a 50 percent reduction in the number of "systems" to be modernized and a significant reduction in active servers.

Question 13. What are the FCC's 10 oldest IT systems or infrastructures? How old are they? Would it be cost-effective to replace them with newer IT investments?

Answer. The FCC has identified the legacy system issue as a core impediment to agency efficiency and a major contributor to overpriced maintenance costs. It would be more cost-effective to replace these systems with newer IT investments and we are moving in this direction. The development of the new Consumer Complaint Database is an example of this work.

I have been advised by our IT staff that examples of our oldest applications include: GenMen, ULS, CDBS, ECFS, ELS, ETFS, EDOCS, EMTS and PAMS. Aging Infrastructure includes: E25K, V490 servers, UPS units in Auctions computer room, Core Routers and the Distribution Switches as well as our SAN. The age of these applications and infrastructure is broad, but mostly falls into the over 10 year range with some probably approaching 20 years.

It is more cost effective to rewrite the applications into a cloud infrastructure versus replacing the equipment. The initial estimate for just modernizing the applications in the way the FCC has been doing business for the past two decades would mean rewriting applications in antiquated code on old platforms in a waterfall approach with an estimate of over $22 million, not including upgrading all of the hardware. Further, that traditional approach is not conducive to short term results through agile development, which significantly reduces our exposure and allows us to adapt quickly to congressional and regulatory requirements. Our request reflects a 50 percent cost avoidance on the development effort alone without even addressing cost avoidance on the hardware.

Question 14. How does FCC's IT governance process allow for the FCC to terminate or "off ramp" IT investments that are critically over budget, over schedule, or failing to meet performance goals? Similarly, how does your department's IT governance process allow for the FCC to replace or "on-ramp" new solutions after terminating a failing IT investment?

Answer. We are currently in the process of implementing a long-term modernization effort. We do not have issues and problems related to over-budget, over-schedule or related issues due in part to a lack of investment in future needs. Our IT governance process, managed through OMD, allows for a fast turn-around through direct contact and discussion with the CFO and Managing Director. We have a rigorous investment review process for all new development and have instituted a review of all O&M and development efforts.

Question 15. What IT projects has the FCC decommissioned in the last year? What are the FCC's plans to decommission IT projects this year?

Answer. We have not decommissioned any IT projects, but did replace the Consumer Complaints Database system. Because of flat appropriations and not having significant new IT projects funded other than auctions, our entire focus has been on O&M for existing systems. We were compelled to halt improvements and upgrades to the Broadband Map this year due to funding restraints.

Question 16. The newly-enacted Federal Information Technology and Acquisition Reform Act of 2014 (FITARA, PL 113–291) directs CIOs to conduct annual reviews of their agency/department's IT portfolio. While I am aware that the FCC is an independent agency, please describe FCC's efforts to identify and reduce wasteful, low-value or duplicative information technology (IT) investments as part of these portfolio reviews.

Answer. In February 2014, the FCC conducted a top-to-bottom review of its internal processes and determined that IT systems at the agency were in serious need of modernization. Since that time, we have been actively engaged in modernizing the remaining portion of the 207 legacy systems and creating integrated systems similar to the Consumer Complaint Database.

The CIO's recommendations on the IT portfolio review are clearly highlighted in our Fiscal Year 2016 Budget request: $5.8 million to replace the FCC's legacy infrastructure with a managed IT Service provider, as well as one-time infusions of $9.6 million to rewrite the FCC's legacy applications as part of a modular "shift" to a modern, resilient, cloud-based platform. We also have asked for $2.2 million to improve the resiliency of the FCC systems, specifically to address gaps identified in our recent FISMA audit process.

Question 17. In 2011, the Office of Management and Budget (OMB) issued a "Cloud First" policy that required agency Chief Information Officers to implement a cloud-based service whenever there was a secure, reliable, and cost-effective option. While I am aware that the FCC is an independent agency, how many of the FCC's IT investments are cloud-based services (Infrastructure as a Service, Platform as a Service, Software as a Service, etc.)? What percentage of the department's overall IT investments are cloud-based services? How has this changed since 2011?

Answer. The FCC currently is planning to move to cloud-based system. Beyond the move of Microsoft products to 0365, which is a full cloud-based deployment, lack of funding will limit our ability to re-write our applications in to a cloud infrastructure. We currently have several examples of our ongoing initiative to move systems to the cloud, including: ZenDesk, Relativity, Mule API Manager, box.com, Google Apps for Government, Amazon Web Services, Appian, and CenturyLink for website deployment. We also are planning for several more, including; Azure, SoftLayer,

Office365, Incentive Auction, ISAS Bidding system, BPM using ServiceNow and IdaaS using Okta. Please note that these involve only partial deployments in most instances. ZenDesk is a full cloud implementation like O365.

Question 18. Provide short summaries of three recent IT program successes—projects that were delivered on time, within budget, and delivered the promised functionality and benefits to the end user. How does your department define "success" in IT program management? What "best practices" have emerged and been adopted from these recent IT program successes? What have proven to be the most significant barriers encountered to more common or frequent IT program successes?

Answer. The FCC rolled out the Consumer Complaint Database at about 1/6th the traditional cost for such a project and it epitomizes many of the agency-wide changes that we hope to implement for IT: inexpensive, off-the-shelf solutions, combined with resiliency, user-friendly options, and the potential to improve our internal data collection methods to increase transparency and inform policy-making decisions. The roll out of VDI has made our agency more efficient and allowed for our workforce to be more mobile and office independent. In addition, the Commission has moved to electronic filing and distribution of licenses for most matters and we are engaged in developing a process for including the remainder. We also are updating ECFS, our 20 year old comments database, which showed strain during the Open Internet proceeding. Completion is targeted for the spring.

Unfortunately, lack of funding has undermined additional system development projects. On April 6, 2015, we did sign a contract to move our server off-premises to a secure Federal cluster site in West Virginia. The move to O365 also is a significant project with a fixed price and will be delivered on time and on budget. Further, we plan to develop and deliver the ECFS commenting system in the same time frame and using the same methodologies as the complaints system. This process will replace the aged and much maligned system that had difficulty handling four million comments during our recent Open Internet ruling.

Also, OMD is working hard on improving the searchability, navigability and appearance of the FCC's external website; improvements in search functionality should be seen within the next two months, if not earlier. Improving usability and appearance has involved input from FCC.gov stakeholders internally and externally. The status of the FCC.gov upgrade project is described in a recent blog post by the FCC's CIO: *www.fcc.gov/blog/modernizing-fccgov-website.*

As part of this process, we revamped the FOIA page at fcc.gov to make data and filing information more readily available to members of the public. Information on the budget and appropriations for the current Fiscal Year and the number of total FTEs are available on the website. FOIA Annual Reports and quarterly reports to DOJ are also available on the website.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOE MANCHIN TO HON. TOM WHEELER

Question 1. AM radio is one of the primary ways of reaching many people in remote portions of West Virginia. From covering local high school sports, to announcing school closings and relaying essential emergency information, AM radio service provides important information to many of my constituents. I understand that the Federal Communications Commission (FCC) issued a Notice of Proposed Rule-Making titled the "Revitalization of AM Radio Service" in November 2013, and I would appreciate an update on that process.

Question 1a. Is it accurate to say that this rulemaking is non-controversial?

Answer. My goal is to ensure that we are revitalizing the AM radio service rather than enriching it by indiscriminately awarding valuable FM translator licenses to a broad class of AM station owners whose abilities to compete in the media ecosystem vary widely. The Commission staff is actively reviewing the record and developing recommendations for the full Commission's consideration.

Question 1b. The public comment period closed March 20, 2014. What is the reason for the delay?

Answer. Commission staff is continuing to review the record in the proceeding and is developing recommendations for the full Commission's consideration. The Commission has proposed, among other things, to have an exclusive filing window for AM stations to apply for FM translator stations, and modest modifications to existing technical rules. On the first point, we have to determine whether there is a need to have an exclusive window given the current availability of FM translator licenses. The number of FM translator licenses has grown from 3,800 in 2003 to about 6,300 today. An additional 1,600 new licenses will be issued over the next 12–18 months.

On the second point, we proposed modest technical changes that would not erode current AM protection standards. However, stakeholders have proposed other changes that need to be carefully evaluated to ensure that we are not creating new interference.

In a recent blog and a speech at the annual conference for the National Association of Broadcasters this month, I referenced my plans to conclude this item with an order in the coming weeks. I look forward to putting forth a proposal for my fellow Commissioners to consider in the near term.

Question 2. On behalf of the Kanawha County Metro 911 and 911 call centers throughout this country, I commend the Commission for updating its E911 rules to help first responders better locate individuals calling from indoors with a wireless phone, but we must do more. According to the FCC, about 70 percent of 911 calls are placed from wireless phones, and that percentage continues to grow every day. The public has an expectation that 911 call centers know their location automatically, and we must commit ourselves to making that a reality.

Question 2a. It's my understanding that the new FCC rules will improve the accuracy of locating wireless calls made indoors by 40 percent over the next two years. Will these rules have any effect on calls made from wireless phones outdoors?

Answer. Yes. The Commission already has location accuracy rules in place for wireless 911 calls made from outdoors, under which wireless providers must deliver location information to Public Safety Answering Points, or PSAPs, within 50 meters for 67 percent of calls and 150 meters for 90 percent of calls if they use handset-based technologies (*e.g.,* GPS), and within 100 meters for 67 percent of calls and 300 meters for 90 percent of calls if they use network-based technologies. These rules remain in place following the Commission's recent location accuracy order.

As you have noted, the new FCC location rules focus on improving location accuracy performance for wireless 911 calls originating from indoor environments. However, we expect that these rules will drive improved location accuracy in outdoor as well as indoor locations. First, the new rules measure compliance by looking at live 911 call data from both indoor and outdoor environments. Thus, the rules will incentivize wireless providers to improve location performance in both environments. Second, we expect that some of the technologies that providers plan to deploy to improve indoor location will also improve outdoor location. For example, data submitted in the record suggests that combining Assisted GPS (A–GPS) and Observed Time Difference of Arrival (OTDOA) technology, both of which providers plan to implement in their new LTE networks, will improve both indoor and outdoor accuracy.

Question 2b. Is there a way to streamline the existing process whereby 911 centers "ping" wireless providers to receive detailed location information from callers to save time in these emergency situations?

Answer. When a wireless user places a 911 call, the wireless provider initiates two location-based functions: (1) it uses cell tower ID and sector information to route the call to the appropriate 911 call center, and (2) it activates other location technologies, which may include GPS and/or network triangulation, to determine the precise location of the caller. Depending on the location technology used, generating and transmitting a precise location fix may take a number of seconds after the call is initiated. For example, where GPS is used, coordinate information on the caller's whereabouts may not be available to the PSAP until 12–30 seconds after the call has connected. This interval is sometimes referred to as the "latency period."

While no location solution is likely to completely eliminate latency, there are ways to reduce the latency period for many 911 calls so that PSAPs can obtain precise location information more quickly. We expect that some of the new technologies being developed for indoor location will reduce latency significantly below 30 seconds, and in many cases may enable precise location information to be generated in no more than a few seconds. In addition, PSAPs can reduce latency by adjusting their bidding and rebidding procedures for retrieving location information as it is updated. It is our goal to ensure that precise location information is made available to PSAPs as quickly as technically possible in each 911 call, and that wireless carriers continue to provide updated location information throughout the call where available and whenever the PSAP requests such information.

Question 2c. What are the next steps the Commission plans to take to improve the accuracy of location information for wireless callers across the board?

Answer. The Commission's January 29, 2015 Order significantly strengthens its location accuracy rules for wireless 911 calls originating in all environments. The Order establishes transparent and measurable benchmarks, many of which are based on the Roadmap Agreement commitments made by the four nationwide carriers and similar commitments by the members of the Competitive Carrier Association. However, the Order goes beyond those voluntary commitments and is more

comprehensive—it is stronger on vertical location, eliminates VoLTE-only performance benchmarks, requires stringent measurement, and includes tools for PSAPs to monitor and seek improvement in location accuracy in their jurisdictions.

With the new rules now in effect, the Commission will turn its focus to monitoring implementation of these requirements and ensuring that wireless providers meet their commitments to improve location accuracy for all wireless 911 calls. Key early steps to be taken by the wireless providers will include establishing a test bed by the 4th quarter of 2015 to begin testing and certifying indoor location technologies; beginning the standards-setting process to support the provision of dispatchable location information to 911 call centers; and developing the National Emergency Address Database and submitting a database security and privacy plan to the Commission.

Question 3. The FCC requires licensees and carriers to post signs warning transient workers—such as roofers and other construction workers—about the presence of radiofrequency (RF) radiation and details about specific areas where the RF radiation exposure is or may be above the legal limit. However, many roofers and other tradesmen report that the signage is not always present, and, when it is, it oftentimes lacks important details about where the RF radiation levels are dangerous.

Question 3a. It's my understanding that the FCC's Universal License System contains a significant amount of useful information, including the location, licensee contact, and power level of some—but not all—devices currently in operation. If that is correct, why doesn't the FCC maintain a central database for all RF radiation generating devices?

Answer. At this stage, the Commission is in the process of modernizing all of its IT systems. One of the issues that we consider when upgrading a specific system is how we can improve the compilation and use of data. Since we have been chronically underfunded in our IT efforts in recent years with six years of flat Commission budgets, we have lacked the resources to make significant improvements to any of our systems.

As we continue to improve our systems and their data capabilities, we will consider the option and feasibility of maintaining a central database for all RF radiation generating devices. One of our first deployments envisioned is a coalescing of databases in a cloud deployment from their present stove piped systems as we rewrite these mission applications to a cloud infrastructure. This will improve our capability and flexibility to make further improvements.

Question 3b. Given the potential for signage to be unavailable, incomplete, or not properly located, what assistance does the FCC provide to transient workers and their employers to help them identify the location of RF radiation generating devices on buildings and other structures?

Answer. The Commission has established requirements to protect workers near radio transmitters from excessive levels of radio frequency RF exposure. These requirements include restrictions on access to areas near antennas (*e.g.,* fencing around antenna towers and restrictions to rooftop antenna farms) and signage to alert works to potential RF hazards. These rules primarily contemplated workers on towers who had an understanding of the steps necessary to avoid excessive RF exposure. As wireless technology has evolved many antennas have been designed to be inconspicuous and are deployed in locations where other types of workers who have little or no knowledge of RF may conduct tasks close by—painting, tree trimming, roof replacement, etc.

The FCC has initiated a comprehensive rulemaking proceeding concerning RF exposure, including proposing changes in the rules to better protect all types of workers. We are planning to implement final rules to improve protections for workers later this year.

Meanwhile, we have vigorously enforced the existing rules. In April of last year Verizon paid $50,000 to resolve an FCC investigation into violations of the Commission's RF exposure limits and agreed to implement a rigorous compliance plan to protect all people near wireless transmission facilities. We are continuing to monitor the compliance of other service providers.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO HON. MIGNON L. CLYBURN

Question 1. Under the reasoning adopted in the Open Internet Order, should a dial-up Internet service provider (ISP) also be classified as a common carrier? Does a dial-up ISP perform any functions different than, or in addition to, those the FCC attributes to a BIAS provider that would enable the FCC to classify the dial-up ISP

as an information service provider? If so, what are those functions? Do you think classification of a dial-up ISP as a common carrier was something that anyone anticipated in 1996?

Answer. In 2010, the FCC did not extend the Open Internet rules to dial-up Internet access because it concluded that the market and regulatory landscape for dial-up was different from broadband Internet access service. Particularly, the FCC found that:

> We also do not apply these [Open Internet] rules to dial-up Internet access service because telephone service has historically provided the easy ability to switch among competing dial-up Internet access services. Moreover, the underlying dial-up Internet access service is subject to protections under Title II of the Communications Act. The Commission's interpretation of those protections has resulted in a market for dial-up Internet access that does not present the same concerns as the market for broadband Internet access. No commenters suggested extending open Internet rules to dial-up Internet access service.[1]

In *Verizon* v. *FCC,* the D.C. Circuit did not disturb the FCC's definition of broadband Internet access including the decision to exclude dial-up Internet access. The 2015 Open Internet Order reaffirms the FCC's 2010 findings and decision.

Question 2. Under the Computer Inquiry rules, the FCC determined that the transmission component of wireline broadband service was limited to a connection between the customer and the ISP, and did not include any connections between the ISP and the rest of the Internet. How does the FCC justify adopting a more expansive classification in the Open Internet Order, which includes every ISPs' connection with the rest of the Internet as a subsidiary part of the common carrier service sold to the end user?

Answer. If I understand your question, the Open Internet Order states that the reclassification of broadband Internet access service involves only the transmission component of Internet access service. It also finds that consumers' use of today's Internet to access content and applications is not inextricably intertwined with the underlying transmission component. In my opinion, the main import of the *Computer Inquiries* decisions is that they disprove the claim that the Commission has never before applied Title II to the transmission component of Internet access service. From 1980 to 2005, facilities-based telephone companies were obligated to offer the transmission component of their enhanced service offerings—including broadband Internet access service offered via digital subscriber line (DSL)—to unaffiliated enhanced service providers on nondiscriminatory terms and conditions pursuant to tariffs or contracts governed by Title II.

Question 3. The definition of "information service" was based largely on the definition that applied to the Bell Operating Companies under the Modified Final Judgment (MFJ) following divestiture. In *United States* v. *Western Elec. Co.,* 673 F. Supp. 525, 587–97 (D.D.C. 1987), aff'd in part, rev'd in part, 900 F.2d 283 (D.C. Cir. 1990), the MFJ court determined that gateway services constituted information services "under any fair reading" of the definition. How would you distinguish Internet access service as offered today from those services that the MFJ found to fall unambiguously within the definition of Internet access?

Answer. The Open Internet Order thoroughly explains, in paragraphs 306 to 433, why classifying broadband Internet access service as a telecommunications service is a reasonable interpretation of the Communications Act. The Commission's prior decisions classifying broadband Internet access service as an information service are based largely on a factual record compiled over a decade ago, during its early evolutionary period. As the Open Internet Order makes clear, the factual premises underlying those decisions have changed. Today, it is more reasonable to assert that the "indispensable function" of broadband Internet access service is "the connection link that in turn enables access to the essentially unlimited range of Internet—based services." This is evident from: (1) consumer conduct, which shows that subscribers today rely heavily on third-party services, such as e-mail and social networking sites, even when such services are included as add-ons in the broadband Internet access provider's service; (2) broadband providers' marketing and pricing strategies, which emphasize speed and reliability of transmission separately from and over the extra features of the service packages they offer; and (3) the technical characteristics of broadband Internet access service.

Question 4. The FCC and state utility commissioners long ago recognized that, if utility-style regulation applies to Internet access service, "it would be difficult to devise a sustainable rationale under which all . . . information services did not fall

[1] 2010 Open Internet Order, 25 FCC Rcd at 17932 at 17935, para. 51

into the telecommunications service category."[2] Do you agree with that previous Commission finding?

Answer. Your question refers to a 1998 Report to Congress concerning the implementation of universal service mandates from the Telecommunications Act of 1996. At that time, wireline broadband and DSL services were classified as telecommunications services. Thus, the Report, which is not a binding FCC Order interpreting the statute, was describing the state of Internet access service 17 years ago and it expressly reserved judgment on whether entities, if they provide Internet access over their own network facilities, were offering a separate telecommunications service.

Question 5. Under the FCC's Open Internet Order rationale, why are the services provided by content distribution networks (CDNs) not classified as telecommunications services? Do they not just transmit information? How are the information processing, retrieval and storage functions of CDN services different from the information functions that are provided as part of broadband Internet access services?

Answer. The 2015 Open Internet Order determined that broadband Internet access service does not include virtual private network (VPN) services, content delivery networks (CDNs), hosting or data storage services, or Internet backbone services, to the extent those services are separate from broadband Internet access service. The Order concluded that such services are distinct from mass market services which the Order defines as "service[s] marketed and sold on a standardized basis to residential customers, small businesses, and other end-user customers such as schools and libraries."

Response to Written Questions Submitted by Hon. Roy Blunt to Hon. Mignon L. Clyburn

Question 1. I fully appreciate your effort to address high rates for phone calls between inmates and their families, friends, lawyers, and clergy.

As I understand it, this issue had been languishing at the FCC for years and it wasn't until 2012, under your leadership as Acting Chairwoman, that the FCC finally issued a Notice of Proposed Rulemaking.

That Notice was approved by the Commission on a bipartisan 5–0 vote. However, when the Report and Order was voted on in 2013, it was approved on a party-line vote.

As Acting Chairwoman at the time, why did this issue lose bipartisan support?

Answer. I was proud of my tenure as Acting Chairwoman to work with my colleagues on a bipartisan basis to tackle a number of items that had been languishing at the Commission. Indeed, we had unanimous, bipartisan decisions on a number of issues including the Notice of Proposed Rulemaking to reform the FCC's E-rate universal service program, an Order to address rural call completion, an Order to reform the FCC's data collection for purposes of the National Broadband Map, and an Order implementing voluntary commitments to resolve the lack of interoperability in the lower 700 MHz band.

On certain issues, my colleagues and I may agree on the goal but not always on the path to achieve the result. As we move forward with additional reforms for inmate calling services, I hope to continue to work with my colleagues for consensus and a solution that complies fully with the obligations under our statute.

Question 2. The National Sheriffs Association, Sheriffs and state associations have presented data and information to show the cost they incur for security and administrative functions necessary to allow inmate calling services in correctional facilities. Are you considering this information? How are you working with the Sheriffs to ensure that your rules do not jeopardize security in jails?

Answer. Yes, we are working with all interested parties, including sheriffs and correctional facilities, to ensure that reforms maintain safe and secure inmate communication. While it is important that reforms comply with the directives of the statute of reasonable rates and fair compensation, it is equally critical that security protocols remain in place.

In February 2014, the FCC's interstate rate caps of $0.21 per debit or prepaid call and $0.25 for collect calls went into effect. Since that time, we have seen tremendously positive results with increased call volumes—as high as 300 percent. At the same time, I have not heard any concerns that the reforms have had a negative impact on security protocols. This result highlights the ability to achieve meaningful reform while maintaining advanced security protocols.

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[2] Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd 11,501, ¶57 (1998).

As we move forward to adopt additional reforms, maintaining this balance is a priority for me. In October 2014, the FCC sought comment on additional reforms to inmate calling services as well as the data submitted by the inmate calling providers in the Second Further Notice of Proposed Rulemaking. Correctional authorities have filed comments and letters in the proceeding and we value their opinions, experiences and expertise. Commission staff is reviewing the record and considering positions from all interested parties.

In addition, Commission staff has met with the National Sheriff's Association, the American Jail Association, regional correctional authorities and sheriffs. The dialogue with correctional authorities is ongoing and we welcome their perspectives and input. My door is always open.

Question 3. The FCC's current proposed rules would extend FCC regulation over the rates charged by inmate calling service providers to inmates for intrastate calls, even though the states regulate intrastate rates. How do you justify this intrusion into states' rights?

Answer. In 2013, the FCC's inmate calling reforms were limited to interstate calls and at that time, I asked our state colleagues to follow our lead. Throughout this proceeding, the Commission has highlighted the problems associated with excessive ICS rates and charges and offered to work with states to address intrastate ICS rates and practices. Unfortunately, only a few including Missouri, have instituted reforms. In fact, in other states, we have seen intrastate rates and site commission payments on intrastate calls actually increase.

In the Second Further Notice of Proposed Rulemaking on inmate calling service (ICS), the Commission sought comment on the legal and policy considerations related to possibly reforming interstate and intrastate ICS rates and practices. While the proceeding is pending and no decision has been reached, Congress gave the FCC explicit authority over intrastate calls as well as authority to preempt inconsistent state regulations.

In particular, Section 276 of the Communications Act of 1934, as amended, provides the Commission with authority over payphone service and inmate calling service. With regard to intrastate calls, Section 276(b) directs the FCC to establish a per call compensation plan "for each and every intrastate and interstate call." Moreover, Section 276(c) states that "[t]o the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements." In the Second Further Notice of Proposed Rulemaking, the Commission sought comment on these provisions, the FCC's legal authority and how to harmonize any forthcoming Commission regulations with state rules and regulations, particularly in states that have taken steps to reform ICS in their jurisdictions, such as Missouri. For example, the Commission asked about adopting exemptions to preemption of inconsistent state laws as well as an approach in which states would be responsible for regulating intrastate ICS as long as that regulation is in compliance with the Commission's core principles for ICS.

The Second Further Notice remains pending and we are continuing to analyze the record received and meet with interested parties on the matter on next steps for inmate calling reforms.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DEB FISCHER TO HON. MIGNON L. CLYBURN

Question 1. All Commissioners, over 40 members of the Senate signed a letter to the FCC last year seeking a way for rate-of-return carriers to receive USF support for broadband-only subscribers. When will the FCC make this bipartisan priority a reality?

Answer. I reiterate my support to reform the universal service regime for rate of return carriers to address the gap in universal service when consumers want to subscribe only to standalone broadband. The current universal service program lacks the proper incentives to reward carriers for deploying broadband networks and having consumers adopt broadband. The status quo, in fact, penalizes carriers for doing just that by taking away certain universal service support when customers subscribe to standalone broadband. The FCC needs to realign incentives and reward carriers for deploying broadband networks and doing so in an efficient manner.

Last year, the FCC unanimously adopted four principles to guide universal service reforms for rate of return carriers: (1) staying within the existing budget of approximately $2 billion a year; (2) distributing support equitably and efficiently; (3) distributing support based on forward-looking costs; and (4) ensuring that no double recovery occurs. Last month, I spoke to NTCA's legislative conference and reiterated

my support for these principles and discussed how to turn these principles into reality in a manner that is predictable and enables carriers to invest and plan.

To truly reach our goal of universal service, however, we need both (1) access to the facilities and (2) access that is affordable. Without both legs in place, the effort will not stand. What is too rarely stated is the fact that the principle of ensuring universal access to low-income consumers shares equal weight in the statute with the principle that high cost, rural and insular areas should have access to reasonably comparable service at reasonably comparable rates to urban areas. Rate of return carriers serve areas that are often less dense and higher cost than urban areas, so the universal service fund plays a pivotal role in the deployment and maintenance of these networks. While carriers, of course, invest their own capital, Federal universal service support is critical in closing the gap between investment and return in less dense, rural areas. In addition, universal service is necessary to ensure that the service, once deployed, is affordable for all. So, it is past time to not only reform the high cost program but also to modernize the FCC's only means-tested adoption program to move it from 1985 to 2015 to ensure that consumers in rural areas can afford to adopt broadband. Both pieces are key to ensure that consumers in high cost, rural areas have access to broadband.

While the Chairman determines the timing of items, I remain ready and able to assist in any way to move forward with reforms. I look forward to working with the Chairman and my colleagues on meaningful reforms for consumers served by rate of return carriers.

Question 2. All Commissioners, what effect does reclassification have on the costs that cable ISPs will have to pay to attach their wires to utility poles and what will this change mean for my rural constituents that are cable broadband customers?

Answer. The FCC's Open Internet Order removes impediments to broadband competition and deployment by allowing new entrants access to poles. Access to poles, as well as rights of way, are critical for infrastructure build-out and the FCC's reclassification ensures that all broadband providers have the right and ability to access poles. Competition leads to better service and lower prices for consumers.

In terms of the rates paid by cable providers for access to pole attachments, the FCC in the Open Internet Order cautioned that any increases could "undermin[e] the gains the Commission achieved by revising the pole attachment rates paid by telecommunications carriers." The FCC also committed to "monitor[] marketplace developments following this Order and can and will promptly take further action in that regard if warranted."

If you are aware of any instances where cable providers are faced with increases in the cost to access poles, please let me know. I want to ensure that the FCC follows through with its commitment to take swift action if there is evidence that pole attachment rates are increasing.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DEAN HELLER TO HON. MIGNON L. CLYBURN

Question 1. I believe that FCC Process reform is long overdue. Do you believe that we can make simple changes to the rulemaking process at the FCC that would create more transparency? Do you believe that we should codify the rulemaking process? Do you believe a proposed rule or amendment to a rule should be published for at least 21 days? If you do not believe that we should publish a proposed rule or amendment for at least 21 days do you believe it should be published before the vote at all?

Answer. I am happy to serve as a resource to your Office as you consider reforms that could make the FCC's processes more efficient, transparent, and accessible to the public. I am pleased to report that the Commission has successfully reduced a significant backlog of items before us. The total volume of items pending at the FCC for more than six months has dropped by more than 44 percent since May 1, 2014. Furthermore, the total volume of licensing-related items pending more than six months at the Commission has dropped by more than 37 percent since May 1, 2014. Finally, the Commission has seen an over 17 percent drop in the number of applications for review and petitions for reconsideration pending more than six months since May 1, 2014. The Bureaus and Offices also have achieved significant backlog reductions. For example, the Enforcement Bureau has closed nearly 8,000 cases since April 2013. The Wireless Bureaus has resolved over 2,000 applications older than six months. And the Media Bureau has reduced its pending AFRs by over 50 percent and granted nearly 1,000 license renewals in the fourth quarter of 2014 alone. We share the concern of the Committee that we ensure process reform increases—rather than reduces—efficiencies. I hope that any specific changes to the

rulemaking process will not reduce the agency's flexibility to address certain problems in the most efficient manner. I also hope that any statutory changes to the rulemaking process would not impede our ability to deliberate among each other and change initial rule proposals.

Question 2. Would you please propose one regulation that we should eliminate?

Answer. It would be helpful if we could eliminate the Sunshine Act rule that prohibits more than two FCC Commissioners from meeting on policy at the same time unless there is a public notice announcing such a meeting.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. CORY BOOKER TO HON. MIGNON L. CLYBURN

Question 1. As mayor of Newark, I saw firsthand how critical local governments are to finding innovative solutions to the unique challenges they face. When it comes to broadband deployment, you don't have to look far to notice the inadequacies that exist in low-income communities and rural areas. In communities with no broadband, slow broadband, or few options to choose from to improve their connectivity, municipal broadband can be a useful tool in connecting communities. In January, I introduced the Community Broadband Act to preserve the rights of local governments to invest in broadband networks should they so choose. I was pleased with the FCC's recent action to grant the petitions of North Carolina and Tennessee which sought waivers freeing them from burdensome state regulations that tied their hands and prevented them from investing in municipal networks. While the FCC's action was a critically important step in the right direction, I think we can still do more to reduce the burdens on local governments and protect their freedom to innovate.

Question 1a. Do you agree that legislation would help ensure that communities have the right to invest in their own broadband networks?

Answer. In my opinion, local elected officials know and are in the best position to address the critical needs of their constituents, be it education, public safety or infrastructure deployment such as broadband. They should not be prevented from responding to requests of citizens, particularly if there is a means to bring neighborhoods out of the digital darkness. There are communities that have literally begged the private sector for high speed Internet, but have been repeatedly turned down. I am proud that the FCC has drawn a line in the sand in favor of local choice to ensure that municipalities have the right to decide whether or not to deploy broadband networks.

As you note, however, the FCC's decision is limited to removing barriers to infrastructure deployment in two states, North Carolina and Tennessee. If another community is being deprived of the benefits of broadband, it must file its own petition requesting relief. The FCC will need to seek comment on any petition and evaluate the record before reaching a decision.

I wish to applaud your leadership and that of Senators McCaskill, Markey, King, and Wyden, in introducing the Community Broadband Act of 2015. In the past, similar legislation enjoyed bipartisan support, and I will offer any assistance I can as Congressional offices consider this proposed legislation.

Question 1b. How do you see municipal broadband helping communities that currently struggle to find affordable, reliable broadband?

Answer. America has been committed to the ideal of universal service for over a century. This principle is so important that Congress enshrined this mandate in Section 254 of the Communications Act, as amended. Section 254 makes clear that "[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas . . . should have access to telecommunications and information services, including . . . advanced telecommunications and information services" and that such services should be "affordable."

In the 20th century, the FCC met its universal service goal by ensuring that all Americans had access to voice telephone service. Today, broadband is an essential service, and, I believe, we are falling woefully short of our statutory mandate in the 21st century with respect to broadband. Too many consumers lack still broadband access and, for many more, the service is simply not affordable.

The consequences of being left in the digital darkness are devastating—depriving communities and their citizens of tools that could greatly improve their lives. Municipalities have at times asked, and even pleaded, for the private sector to respond to requests and deploy broadband in their communities. Too many times, I am sad to say, the answer has been no.

Municipal broadband projects may be the only way for citizens to receive affordable, reliable broadband, with localities often working through public-private partnerships to close existing divides. Too many foreclosed opportunities currently exist because state laws are preventing cities and towns from deploying their own networks even if their constituents overwhelmingly endorse the effort. Communities are being left behind, digital gaps are widening, and promises of universal access remain unfilled. With the vote that I cast on February 26th, one more barrier has been lifted in two states.

Question 2. Thank you for your leadership on prison phone reform and I applaud the FCC's actions to better regulate interstate prison phone calling rates so that inmates can stay better connected to their families, and ultimately have a better chance at rehabilitation and assimilation back into society. I recently reintroduced the REDEEM Act with Senator Rand Paul, which aims to provide comprehensive reforms to our Nation's prison system and end the perpetual cycle of imprisonment. Just as you saw abuses in inmate calling rates, it appears the next frontier could be abuses in new technologies like video conference calls. I'm concerned that in-person visits may be replaced by video conference calls, in order for prisons to profit of these visitations.

Question 2a. Do you share these concerns?

Answer. Yes, I share these concerns. We know that meaningful contact helps to promote rehabilitation and reduce recidivism and as a result, we should do everything in our power to promote communication and connectivity with friends and family. Unfortunately, high rates for inmate calling have discouraged such contact and ever increasing rates make it difficult, if not impossible, for struggling families to stay in touch.

I was extremely proud during my term as Acting Chairwoman to take a critical first step in tackling this issue. In August 2013, the FCC adopted interstate rate caps to ensure that those rates are just and reasonable. After the FCC's rate caps for interstate inmate calling service (ICS) calls went into effect in February 2014, interstate call volumes went up between 70 and 300 percent. These data remove any doubt that unaffordable rates discourage contact while a more affordable regime promotes communications.

I share your concern that services are migrating to video visitation and the same marketplace failures we saw with voice services are likely to flow to video visitation. In the current inmate calling market, providers compete to become a monopoly provider of inmate calling services to a correctional facility. All too often, the selection of the provider is based on which company promises the biggest economic return to the facility without regard to the cost borne by the consumer. While the FCC is poised to reform calling services, we do not want to create a loophole where calls migrate to another platform and consumers are once again left with an unaffordable rate regime.

For this reason, the FCC recently sought comment on the need for reform of alternative technologies in correctional facilities in our October 2014 Second Further Notice of Proposed Rulemaking. We specifically asked about video visitation as the FCC needs to be forward-looking and ensure that protections are in place today and in the future. We are working to develop a record on what is occurring and whether the FCC needs to intervene.

Question 2b. What more must be done to bring justice to prison communications and allow families to stay connected?

Answer. The FCC must reform all aspects of inmate calling services to bring final and comprehensive relief to families, friends, lawyers and clergy. While the FCC's rate caps have had positive results as shown by call volumes increasing, the reforms were limited to interstate calls. Approximately 85 percent of ICS calls are intrastate and these rates have not been reformed. We have also seen payments to facilities, known as site commissions, go up and new fees and charges, known as ancillary charges, increase. The FCC needs to act swiftly to bring relief and adopt a reasonable rate structure for all ICS calls.

Data underscore the critical need for the FCC to promote connectivity and reform inmate calling services. In April 2014, the United States Department of Justice released a report analyzing the five-year recidivism rates for over 400,000 prisoners in 30 states, and the results are troubling. Two-thirds were rearrested within three years, and three-quarters were rearrested within five years. These trends come with enormous societal costs. In addition to more crime, crowded correctional facilities, more expensive prisons, and the judicial time required to prosecute these offenses, it costs an average of $31,000 per year to house each inmate. While we do not know how to solve all of the criminal justice challenges, we do know that meaningful communication helps to promote rehabilitation, thus reducing recidivism.

It is my hope that the FCC will take final action this summer. I appreciate your leadership on this issue and look forward to working with you to bring justice to the Inmate Calling Services regime.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO HON. MICHAEL O'RIELLY

Question 1. What are your views on the interconnection provisions in the Open Internet Order and the record on which the FCC based such provisions?

Answer. I am deeply troubled by the Commission's decision to impose regulations on what has been known for years as peering, especially under a vague standard contained in section 201 of the Communications Act (*i.e.,* just and reasonable) and without any evidence of actual harm to providers or consumers. The Commission's lack of a record to establish such a regime is astounding and is a deep exposure point for future litigation from a process perspective. More importantly, I do not agree with the claims of statutory authority used to justify the new review process. Lastly, the case-by-case structure based on complaints by those disagreeing with how private negotiations are going creates a high level of uncertainty that will cloud the peering marketplace.

Question 2. You recently wrote a blog post critical of the use of "delegated authority." Can you expand on your concerns in this area, and do you fear that "delegated authority" has become a mechanism for diminishing the ability of commissioners to influence the FCC's business?

Answer. The use of delegated authority is not a new practice by the Commission, but its increased use is a troubling one. Overall, its use is a systemic effort to expand the power of the majority to effectuate its agenda under the guise of efficiency. Unfortunately, by decreasing debate and thoughtful review, it increases the likelihood that outcomes and decisions are unsustainable—both from a process and policy perspective. In fact, I am living with decisions to delegate authority to staff made years ago by previous Commissions, which seems unreasonable. I have advocated specific changes to delegated authority that would address the biggest drawbacks to its use. These include requiring the staff to notify Commissioners no later than 48 hours before release of an item in which delegated authority is used for non-routine matters. This uniform period is not provided today. Additionally, Commissioners should have the right to undelegate an item and resolve it by a full Commission vote.

Question 3. The FCC and state utility commissioners long ago recognized that, if utility-style regulation applies to Internet access service, "it would be difficult to devise a sustainable rationale under which all . . . information services did not fall into the telecommunications service category."[1] Do you agree with that previous Commission finding?

Answer. Disappointingly and against my views, I predict that over time the Commission will expand its reach under the new Net Neutrality rules beyond broadband networks to apply to all other types of information services, such as the application layer (*i.e.,* edge providers). Despite promises not to do this, there is nothing in the rules that would prevent it from occurring and the natural mission creep of a regulatory body will expand into areas not supposedly intended. The reality is that this Commission has already extended itself into the edge provider area in a couple of instances (*e.g.,* text to 911). Additionally, the lines between broadband networks and edge providers have blurred and will continue to do so, making it more likely that the Commission will overstep this imaginary line.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. ROY BLUNT TO HON. MICHAEL O'RIELLY

Question. In 1991, Congress passed the Telephone Consumer Protection Act (TCPA). The intent of the legislation was to cut down on the growing number of unwanted telemarketing calls interrupting families and consumers at home. At the time, 90 percent of households used a landline telephone, but today technology is changing as more households "cut the cord" and use wireless phones.

Despite the change in technology, TCPA regulations have not kept pace and need to be modernized.

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[1] Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd 11,501, ¶57 (1998).

Today, there are numerous petitions that have been pending at the FCC for months, and in many cases for over a year.

The lack of action by the FCC is hurting consumers. For example, as Chairman of the Appropriations Subcommittee on Labor, Health, and Education, I hear from student loan servicers who cannot contact graduates in danger of becoming delinquent on their payments.

This is detrimental to a student's long-term credit, and the problem extends to virtually every business across every sector of the economy.

Commissioner O'Rielly, is it possible for the FCC to address this issue?

Answer. I believe that it is an absolute necessity that the Commission act on the issues raised by the more than almost three dozen petitions seeking clarity and relief from the TCPA, as authorized by the statute, in order to permit the offering of beneficial services to consumers by legitimate companies. Disappointingly, a number of parties have argued that any action on such petitions would be an effort to flood consumers with robocalls, which is certainly not my goal nor a realistic assessment. I am hopeful that the Commission will be able to overcome this demagoguery and thoughtfully act on this issue in the near future.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DEB FISCHER TO HON. MICHAEL O'RIELLY

Question 1. All Commissioners, over 40 members of the Senate signed a letter to the FCC last year seeking a way for rate-of-return carriers to receive USF support for broadband-only subscribers. When will the FCC make this bipartisan priority a reality?

Answer. As I previously promised to Chairman Thune, I will dedicate the necessary energy and time to resolve the remaining pieces of USF reform, including developing solutions for rate-of-return carriers. During my time at the Commission, I have actively engaged the carriers and Commission staff on ways to move forward with the intent to reach resolution in quick fashion. I am worried, however, that meeting an year-end deadline will require some significant changes in the priorities of the Commission, including resources and staff, as well as a willingness of all parties to find an acceptable compromise. I am hopeful that the recent attention to this issue, as evident by it being raised in the Commerce hearing, will expedite the timeline.

Question 2. All Commissioners, what effect does reclassification have on the costs that cable ISPs will have to pay to attach their wires to utility poles and what will this change mean for my rural constituents that are cable broadband customers?

Answer. At this point in time, it would certainly seem that the decision by my colleagues to reclassify retail broadband Internet access service as a telecommunications service will lead to rate increases for pole attachments, as governed by section 224 of the Communications Act. I am worried that any increases will make it more expensive to deploy broadband by companies and access broadband by consumers, especially in rural America. While the Commission has indicated that this is not the desired outcome, and staff is now seeking comment on an aspect of this issue, it is unclear what the outcome or legal justification will be.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DEAN HELLER TO HON. MICHAEL O'RIELLY

Question 1. I believe that FCC Process reform is long overdue. Do you believe that we can make simple changes to the rulemaking process at the FCC that would create more transparency? Do you believe that we should codify the rulemaking process? Do you believe a proposed rule or amendment to a rule should be published for at least 21 days? If you do not believe that we should publish a proposed rule or amendment for at least 21 days do you believe it should be published before the vote at all?

Answer. I appreciate your great leadership on this issue and concur with your efforts. I have outlined a number of ways to reform the Commission's procedures, particularly as it pertains to resolving issues at the Commissioner level, that would improve transparency, efficiency and accountability. I agree with each of your questions posed above.

Question 2. Would you please propose one regulation that we should eliminate?

Answer. While it is difficult to select one specific rule for elimination, I suggest that it is time to consider the outright ending of the Commission's separations regime. In it, the Commission and states allocate telecommunications carriers' costs

based on whether the service is Federal or state in nature. In our modern communications environment, and particularly given the purely interstate nature of the Internet, the old separations structure is a good candidate for being eliminated or at least seriously curtailed. The Federal-State Joint Board on Separations is currently considering separations reform, and I hope that they will complete their comprehensive review, with an eye towards ending these rules, in the near future.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO HON. AJIT PAI

Question 1. What are your views on the interconnection provisions in the *Open Internet Order* and the record on which the FCC based such provisions?

Answer. The *Notice of Proposed Rulemaking* (*NPRM*) discussed IP interconnection in a single paragraph, tentatively concluding that the FCC should maintain the previous restrained approach, so that the Part 8 "Open Internet" rules would not apply "to the exchange of traffic between networks, whether peering, paid peering, content delivery network (CDN) connection, or any other form of inter-network transmission of data, as well as provider-owned facilities that are dedicated solely to such interconnection." Nevertheless, the *Open Internet Order* subjected IP interconnection arrangements to sections 201 and 202 of the Communications Act, arrogating to the FCC the power to order an Internet service provider "to establish physical connections with other carriers, to establish through routes and charges applicable thereto . . . and to establish and provide facilities and regulations for operating such through routes." In other words, the *Open Internet Order* adopted an unprecedented approach radically different from what the *NPRM* proposed. The record is hardly adequate to justify such a decision. Indeed, the best evidence in the record suggests the free market for interconnection has been an unmitigated success, with transit rates falling 99 percent over the last decade. In short, that decision was both unwise and unlawful.

Question 2. The FCC and state utility commissioners long ago recognized that, if utility-style regulation applies to Internet access service, "it would be difficult to devise a sustainable rationale under which all . . . information services did not fall into the telecommunications service category."[1] Do you agree with that previous Commission finding?

Answer. I do.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. ROY BLUNT TO HON. AJIT PAI

Question 1. Commissioner Pai, regarding the FCC's actions on inmate calling services, I saw that you voted in favor of the 2012 Notice of Proposed Rulemaking, and that the Notice was adopted by a 5–0 vote. However, you voted against the final Order in 2013, and you wrote a dissenting opinion to the Order. Can you elaborate for the record why you dissented?

Answer. I dissented from the *Order* because it was legally infirm and bad policy. On the legal question, I thought the *Order* violated the Administrative Procedure Act by adopting rules that had never been proposed and by ignoring record evidence that contradicted the *Order*'s conclusions. On the policy side, I would have supported action to institute simple and reasonable rate caps. But the *Order* instead combined *de facto* rate-of-return regulation for ICS providers at all correctional institutions in America, which the FCC could not have administered effectively, with a flawed rate cap that would have resulted in county jails, secure mental health facilities, and juvenile detention centers scaling back their security measures or even terminating inmate calling services entirely. Five months after the FCC adopted the *Order,* the D.C. Circuit Court of Appeals stayed the majority of the *Order* from taking effect, presumably because it identified similar shortcomings in the FCC's decision.

Question 2. The FCC now has proposed rules to extend its regulation over the rates charged by inmate calling service providers to inmates for intrastate calls, even though the states regulate intrastate rates. Do you believe the FCC can justify this intrusion into states' rights?

Answer. I am skeptical that the FCC has the authority to regulate the intrastate telephone rates of inmate calling service providers given section 2 of the Commu-

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[1] Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd 11,501, ¶57 (1998).

nications Act, which states that nothing in the Act "shall be construed to apply or to give the Commission jurisdiction with respect to [ ] charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier."

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DEB FISCHER TO HON. AJIT PAI

Question 1. All Commissioners, over 40 members of the Senate signed a letter to the FCC last year seeking a way for rate-of-return carriers to receive USF support for broadband-only subscribers. When will the FCC make this bipartisan priority a reality?

Answer. Two years ago, I called on the FCC to reform the USF to support broadband-capable facilities for rate-of-return carriers. And though progress has been slow—it took more than a year before the Commission sought comment on a standalone-broadband mechanism for rate-of-return carriers in June 2014—we're nearing the end. Along with my fellow Commissioners, I have committed to working towards adoption of a standalone-broadband mechanism by the end of the year. Although as a Commissioner I do not set the agenda, I am hopeful that we will remain on course.

Question 2. All Commissioners, what effect does reclassification have on the costs that cable ISPs will have to pay to attach their wires to utility poles and what will this change mean for my rural constituents that are cable broadband customers?

Answer. Reclassification is likely to increase the costs of cable ISPs by $150–200 million per year, increasing the cost of broadband to rural consumers. That's because cable ISPs will no longer qualify for the section 224(d) pole attachment rate (the cable rate) and instead will have to pay the higher section 224(e) rate (the telecom rate). Some companies will try to recoup these costs through higher rates; others will delay or avoid investment in rural America. Either way, it means higher prices and lower speeds for your rural constituents going forward.

Question 3. Commissioner Pai, can you share your views on the so-called general conduct rule and what it would mean for innovation and regulatory certainty? Do you believe this language is written in a way to only apply to ISPs?

Answer. The FCC's new Internet conduct standard gives the FCC a roving mandate to review business models and upend pricing plans that benefit consumers. With only seven vaguely worded—and non-exhaustive—factors to guide enforcement, the FCC will have almost unfettered discretion to decide what business practices clear the bureaucratic bar, and decisions about network architecture and design will no longer be in the hands of engineers but bureaucrats and lawyers. As the Electronic Frontier Foundation wrote: This open-ended rule will be "anything but clear," "suggests that the FCC believes it has broad authority to pursue any number of practices," and "gives the FCC an awful lot of discretion, potentially giving an unfair advantage to parties with insider influence." Even FCC leadership conceded that "we don't really know" what the Internet conduct rule prohibits, and "we don't know where things go next." That is the very definition of regulatory uncertainty, and entreprenuers will need to start seek permission from the FCC before innovating.

Although the rule apparently applies only to ISPs at this time, the reasoning underlying the rule and the FCC's expansive interpretation of section 706 of the Telecommunications Act gives the FCC a platform to apply this rule throughout the Internet ecosystem going forward.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DEAN HELLER TO HON. AJIT PAI

Question 1. I believe that FCC Process reform is long overdue. Do you believe that we can make simple changes to the rulemaking process at the FCC that would create more transparency? Do you believe that we should codify the rulemaking process? Do you believe a proposed rule or amendment to a rule should be published for at least 21 days? If you do not believe that we should publish a proposed rule or amendment for at least 21 days do you believe it should be published before the vote at all?

Answer. I agree that changes should be made to the rulemaking process at the FCC in order to provide for greater transparency. The American people are too often left in the dark when it comes to agency decision-making. In the meantime, favored special interests are able to gain access to "non-public" information. This is wrong.

The American people have a right to know what their government is doing. I therefore believe that drafts of all agenda items, including proposed rules or amendments to rules, should be released to the public at least 21 days prior to FCC meetings. I also favor codifying this practice in the FCC's rules.

Question 2. Would you please propose one regulation that we should eliminate?

Answer. There are many candidates, but one particularly outdated rule that the Commission should eliminate is the newspaper-broadcast cross-ownership prohibition. That regulation was enacted in 1975, a time when the information marketplace was vastly different than it is today. Back then, cable news didn't exist; neither did the Internet. Now, Americans can access an ever-widening range of news and information online at any time, day or night, so fewer and fewer of us choose to subscribe to a daily newspaper. And as online advertising becomes ever more local and mobile, the advertising niche once served by newspapers is fading fast. The numbers say it all. Since the newspaper-broadcast cross-ownership rule was enacted in 1975, over one in five newspapers in the United States has gone out of business. During that same time period, while the number of households in our country has increased by over 55 percent, newspaper circulation has declined by more than 25 percent. Had the prohibition on newspaper-broadcast cross-ownership been eliminated years ago, the industry's prospects might look brighter today. Investments in newsgathering are more likely to be profitable when a company can distribute news over multiple platforms. And cross-owned television stations on average provide their viewers with more news than do other stations. Given these facts and the substantial challenges facing the newspaper business, it doesn't make sense to single out broadcasters and prevent them from operating newspapers. If you are willing to invest in a newspaper in this day and age, the government should be thanking you, not standing in your way.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO HON. JESSICA ROSENWORCEL

Question 1. Under the reasoning adopted in the Open Internet Order, should a dial-up Internet service provider (ISP) also be classified as a common carrier? Does a dial-up ISP perform any functions different than, or in addition to, those the FCC attributes to a BIAS provider that would enable the FCC to classify the dial-up ISP as an information service provider? If so, what are those functions? Do you think classification of a dial-up ISP as a common carrier was something that anyone anticipated in 1996?

Answer. The Open Internet Order limits its scope to "broadband Internet access service" which excludes dial-up Internet service. *See Open Internet Order,* FCC 15–24, ¶187, n.456. This exclusion was initially adopted in 2010. At that time, the Commission determined that dial-up Internet access service should be excluded from the definition of broadband Internet access service for three primary reasons. First, Title II regulations already apply to the telephone connections that dial-up subscribers use to access dial-up services. Second, the market for dial-up Internet access services did not present the same concerns as the market for broadband Internet access. Namely, "telephone service has historically provided the easy ability to switch among competing dial-up Internet access services." *2010 Open Internet Order,* 25 FCC Rcd 17905, 17935, ¶51. And third, due to the slow speeds of dial-up, many of the Internet applications and services—such as streaming video—that may be the most susceptible to discriminatory conduct, are unavailable as a practical matter over dial-up. *See 2009 Open Internet Notice of Proposed Rulemaking,* 24 FCC Rcd 13064, 13101, ¶91, n.209, cited in *2010 Open Internet Order* at n.161. As such, the Open Internet Order does not address the regulatory classification of dial-up Internet access service. For these reasons, I believe the exclusion of dial-up Internet service from the definition of broadband Internet access service makes sense.

Question 2. Under the Computer Inquiry rules, the FCC determined that the transmission component of wireline broadband service was limited to a connection between the customer and the ISP, and did not include any connections between the ISP and the rest of the Internet. How does the FCC justify adopting a more expansive classification in the Open Internet Order, which includes every ISPs' connection with the rest of the Internet as a subsidiary part of the common carrier service sold to the end user?

Answer. Broadband service—as it is offered today—did not exist at the time the FCC's Computer Inquiry regime was put in place back in 1985. The Computer Inquiry rules distinguished between (1) "basic" services, which were subject to common carrier regulation; and (2) "enhanced" services which were not. *See Amendment*

of Section 64.702 of the Comm'n's Rules & Regs, Final Decision, 77 F.C.C. 2d 384, ¶¶ 115–23 (1980) ("*Computer II*"). This distinction was effectively codified by Congress in the definitions of "telecommunications service" and "information service" in the Telecommunications Act of 1996. In *Brand X,* the Supreme Court held that those statutory terms were ambiguous with respect to their application to cable modem service and that the Commission is entitled to deference. *Nat'l Cable & Telcomms. Ass'n* v. *Brand X Internet Servs.,* 545 U.S. 967, 986–1000 (2005).

In the Open Internet Order, the Commission exercised its authority, consistent with *Brand X,* to interpret the statutory terms "telecommunications service" and "information service" based on the current facts in the record about broadband Internet access service. The Commission also found that "disputes involving a provider of broadband Internet access service regarding Internet traffic exchange arrangements that interfere with the delivery of a broadband Internet access service end user's traffic are subject to our authority under Title II of the Act." *Open Internet Order,* ¶ 204. For this reason, the Commission found that the definition of broadband Internet access service "includes the exchange of Internet traffic by an edge provider or an intermediary with the broadband provider's network." *Open Internet Order,* ¶ 195.

Question 3. The definition of "information service" was based largely on the definition that applied to the Bell Operating Companies under the Modified Final Judgment (MFJ) following divestiture. In United States v. Western Elec. Co., 673 F. Supp. 525, 587–97 (D.D.C. 1987), aff'd in part, rev'd in part, 900 F.2d 283 (D.C. Cir. 1990), the MFJ court determined that gateway services constituted information services "under any fair reading" of the definition. How would you distinguish Internet access service as offered today from those services that the MFJ found to fall unambiguously within the definition of Internet access?

Answer. The Open Internet Order is limited in scope to broadband Internet access service, and I cannot speculate as to how they compare to the gateway services the MFJ court examined. Consistent with Supreme Court precedent in *Brand X,* in the Open Internet Order, the Commission interprets and applies today's law, the Telecommunications Act of 1996, to today's service—broadband Internet access service. The Supreme Court in *Brand X* held that the telecommunications and information service definitions were ambiguous as to the provision of cable modem service and that the Commission is entitled to deference in its interpretation of the terms. *Nat'l Cable & Telcomms. Ass'n* v. *Brand X Internet Servs.,* 545 U.S. 967, 986–1000 (2005). In the Open Internet Order, the Commission exercised its authority to interpret ambiguous terms in the statute and found, based on the record, that broadband Internet access service as it is offered today is best understood as a telecommunications service.

Question 4. The FCC and state utility commissioners long ago recognized that, if utility-style regulation applies to Internet access service, "it would be difficult to devise a sustainable rationale under which all . . . information services did not fall into the telecommunications service category."[1] Do you agree with that previous Commission finding?

Answer. The finding quoted above was made in a report to Congress, referred to as the *Stevens Report,* which primarily concerned the implementation of universal service mandates and was not a Commission Order classifying Internet access services. In addition, when the *Stevens Report* was issued back in 1998, broadband Internet access service was at "'an early stage of deployment to residential customers' and constituted a tiny fraction of all Internet connections." *Open Internet Order,* ¶ 315 quoting *Stevens Report,* ¶ 91. And further, the *Stevens Report* reserved judgment on whether entities that provided Internet access over their own network facilities were offering a separate telecommunications service. It notes that "the question may not always be straightforward whether, on the one hand, an entity is providing a single information service with communications and computing components, or, on the other hand, is providing two distinct services, one of which is a telecommunications service." *Open Internet Order,* ¶ 315 quoting *Stevens Report,* ¶ 60.

Therefore, based on record evidence on the manner in which broadband Internet access service is offered today, the Commission, including myself, has concluded that it is best understood as a telecommunications service. The Order does not reach the classification of any other service. *Open Internet Order,* ¶ 418.

Question 5. Under the FCC's Open Internet Order rationale, why are the services provided by content distribution networks (CDNs) not classified as telecommuni-

[1] Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd 11,501, ¶ 57 (1998).

cations services? Do they not just transmit information? How are the information processing, retrieval and storage functions of CDN services different from the information functions that are provided as part of broadband Internet access services?

Answer. The Open Internet Order limits its scope to broadband Internet access service, and this does not include content delivery networks or CDNs. As the Order explained, the Commission has historically distinguished CDN services from "mass market" broadband services because they "do not provide the capability to transmit data to and receive data from all or substantially all Internet endpoints." *Open Internet Order,* ¶ 340.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DEB FISCHER TO HON. JESSICA ROSENWORCEL

Question 1. All Commissioners, over 40 members of the Senate signed a letter to the FCC last year seeking a way for rate-of-return carriers to receive USF support for broadband-only subscribers. When will the FCC make this bipartisan priority a reality?

Answer. In Section 254 of the Telecommunications Act of 1996, Congress defined universal service as "an evolving level of telecommunications service." In addition, Congress charged the Commission with "periodically" updating this definition, while "taking into account advances in telecommunications and information technologies and services."

To this end, it is important that the Commission recognize that an increasing number of households are subscribing to broadband service without also subscribing to traditional voice telephony. This is true in both urban and rural communities. As a result, I think the time is right to develop policies that grant rate-of-return carriers serving rural areas the flexibility to receive support for broadband-only subscribers. I would like the Commission to complete a proceeding on this matter as soon as possible and no later than the end of this year.

Question 2. All Commissioners, what effect does reclassification have on the costs that cable ISPs will have to pay to attach their wires to utility poles and what will this change mean for my rural constituents that are cable broadband customers?

Answer. In the February 26, 2015 Order *Protecting and Promoting the Open Internet,* the Commission stated that it was "committed to avoiding an outcome in which entities misinterpret today's decision as an excuse to increase pole attachment rates of cable operators providing broadband Internet access service." The Commission also stated that such increases would be "unacceptable as a policy matter," and the agency committed to monitoring the marketplace for any such changes.

To this end, on May 6, 2015, the Commission's Wireline Competition Bureau released a Public Notice seeking to refresh the record on a petition filed by a number of parties, including some in the cable industry. The petition specifically requests that the Commission examine the cost allocators used in the calculation of the telecommunications rate for pole attachments in order to minimize the difference between rates paid by telecommunications providers and cable operators. I look forward to reviewing the record in response to this Public Notice.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DEAN HELLER TO HON. JESSICA ROSENWORCEL

Question 1. I believe that FCC Process reform is long overdue. Do you believe that we can make simple changes to the rulemaking process at the FCC that would create more transparency? Do you believe that we should codify the rulemaking process? Do you believe a proposed rule or amendment to a rule should be published for at least 21 days? If you do not believe that we should publish a proposed rule or amendment for at least 21 days do you believe it should be published before the vote at all?

Answer. I believe any agency or arm of the government can find ways to act with greater speed, efficiency, and transparency. The Commission is no exception. That is why I support efforts to examine and improve the Commission's rulemaking practices and procedures.

Specifically, I support efforts to clarify our rulemaking process. But I believe that it is essential that any changes made are compliant with both the Communications Act and the Administrative Procedure Act. Moreover, it is important that efforts to improve our rulemaking practices do not increase red tape or bureaucracy. That is because I believe the agency needs to be nimble in a fast-moving and dynamic communications marketplace.

As a general matter, I believe the Commission should make available proposed rule text in its Notices of Proposed Rulemaking when initiating a proceeding that could lead to significant changes to agency policies. Moreover, I believe under normal circumstances this text should be made available at least 21 days in advance of a decision on final rules.

Question 2. Would you please propose one regulation that we should eliminate?

Answer. It is time to eliminate the ORBIT Act report. This report, which the Commission is required to file with Congress annual basis, is no longer necessary in light of the successful privatization of Intelsat and Inmarsat that occurred more than a decade ago. By eliminating this requirement, Congress can free up resources that are necessary to produce this document and allow the agency to dedicate them to more current matters.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. CORY BOOKER TO HON. JESSICA ROSENWORCEL

Question 1. As mayor of Newark, I saw firsthand how critical local governments are to finding innovative solutions to the unique challenges they face. When it comes to broadband deployment, you don't have to look far to notice the inadequacies that exist in low-income communities and rural areas. In communities with no broadband, slow broadband, or few options to choose from to improve their connectivity, municipal broadband can be a useful tool in connecting communities. In January, I introduced the Community Broadband Act to preserve the rights of local governments to invest in broadband networks should they so choose. I was pleased with the FCC's recent action to grant the petitions of North Carolina and Tennessee which sought waivers freeing them from burdensome state regulations that tied their hands and prevented them from investing in municipal networks. While the FCC's action was a critically important step in the right direction, I think we can still do more to reduce the burdens on local governments and protect their freedom to innovate.

Question 1a. Do you agree that legislation would help ensure that communities have the right to invest in their own broadband networks?

Answer. Absolutely. American enterprise and self-sufficiency are the stuff of legend. History, however, demonstrates that when we really thrive is when we come together in common cause to get things done. For our forbears, this meant everything from holding barn raisings to building bridges, to setting up cooperatives to bring electricity to our Nation's farms. But our infrastructure challenges are not limited to the past nor limited to rural areas. Today we have communities that face them across the country—with broadband.

That is why the FCC's recent action regarding municipal broadband is so important. As our record at the agency suggests, when existing providers failed to meet their broadband needs, communities in Chattanooga, Tennessee and Wilson, North Carolina came together and built it themselves. That strikes me as fundamentally American—and something we should support.

However, there are limits to the FCC's action. It only addressed specific laws affecting communities in two states. Moreover, it was limited to efforts to extend currently authorized municipal networks.

As a result, legislation—like the Community Broadband Act—is valuable. It can address broader issues related to municipal broadband and clarify the rights of communities interested in developing their own networks.

Question 1b. How do you see municipal broadband helping communities that currently struggle to find affordable, reliable broadband?

Answer. Broadband is more than a technology—it's a platform for opportunity. Access to high-speed service is now necessary to attract and sustain businesses, expand civic services, and secure a viable future. That's why so many communities across the country are exploring the possibilities of providing municipal service. It may not be the right course in every case. However, where it is viable, it can bring broadband to places that presently lack adequate service and in other locations can provide competitive pressure to lower the cost of service and make it more affordable.

Question 2. I joined my colleague Senator Rubio in reintroducing the Wi-Fi Innovation Act, which aims to address the growing demand for spectrum by encouraging more spectrum sharing for unlicensed Wi-Fi use. Freeing up more spectrum will pave the way for economic growth and innovation. As you know, spectrum in this band was allocated in 1999 for use in intelligent transportation to improve roadway safety. While these uses have continued to slowly develop, the demand for Wi-Fi has

sky rocketed. Furthermore, new technologies that don't require dedicated spectrum, such as autonomous cars, advanced camera and radar technology, and automatic breaking are advancing. I was pleased to read your blog outlining the importance of freeing up spectrum in the 5 GHz band.

Question 2a. What can the Commission do to safely and swiftly move the process forward to test the potential of making this band available for Wi-Fi use?

Answer. To understand how the FCC can move safely and swiftly to make more Wi-Fi available in the upper portion of the 5 GHz band, it is useful to review the legislative and regulatory history concerning this portion of the airwaves.

In the Middle Class Tax Relief and Job Creation Act of 2012, Congress directed the FCC and the NTIA to take a close look at the upper portion of the 5 GHz band. As a result, the FCC began a rulemaking in February 2013 (FCC 13–22) that proposed freeing up more spectrum in these airwaves. This rulemaking specifically incorporated into the record the NTIA's study of unlicensed device use in the 5.85–5.925 GHz band. Since then, in an order in August 2014 (FCC 14–30), the FCC took steps to make more spectrum available for Wi-Fi in the lower portion of the 5 GHz band. This is helpful—but it means that the Commission still has work to do to move forward on unlicensed opportunities in the 5.85–5.925 GHz portion of the band.

As you note above, the 5.85–5.925 GHz band was allocated more than 15 years ago for Dedicated Short Range Communications Services (DSRC) systems designed to improve roadway safety. But progress on the development of DSRC systems has been slow. In the meantime, demand for unlicensed services like Wi-Fi has exploded. In addition, during the same period, spectrum sharing technologies have advanced considerably.

In light of this background, I believe it is time for the FCC to move forward and develop unlicensed spectrum opportunities in the upper portion of the 5 GHz band. Moreover, I have advocated for this course in a blog post with my colleague Commissioner O'Rielly (Driving Wi-Fi Ahead: the Upper 5 GHz Band: *http://www.fcc.gov/blog/driving-wi-fi-ahead-upper-5-ghz-band*). To do this safely and swiftly, we should encourage the use of experimental licenses for testing in this band. In addition, we should refresh the record from our 2013 rulemaking and commit to developing final rules for unlicensed service in this portion of the 5 GHz band as soon as possible thereafter.

Question 2b. How can we in Congress help?

Answer. Congress should encourage the Commission to refresh its record on the possibilities for greater unlicensed use in the upper 5 GHz band and develop final rules as soon as possible thereafter.

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