



Testimony of Gene Kimmelman
President
Public Knowledge

Before the
U.S. Senate
Committee on the Commerce, Science, and Transportation

Hearing On:
Protecting the Internet and Consumers Through Congressional Action

Washington, DC
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Public Knowledge,¹ along with millions of consumers, civil and media rights groups,² small businesses, and innovative start-up companies, believes that application of Title II authority under the Communications Act is critical to preserve and promote an open Internet that is affordable to all and fully supportive of freedom of expression.³ We therefore support the FCC's current efforts to adopt Title II rules in response to the most recent DC Circuit court ruling. Public Knowledge also believes it is entirely appropriate for Congress to consider updating the Act to address inadequacies in law and to guide the FCC's understanding of Congressional intent. However, the draft legislation proposed by Chairman Thune on January 16, 2015, raises a number of serious concerns about how and when such Congressional intervention is warranted, and raises many questions about the specific tools Congress must empower the FCC to use in order to effectively preserve and promote an open, affordable, nondiscriminatory Internet.

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

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

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

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

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

The Speed of Broadband Evolution Lends Itself to Agency Oversight

Since the first publicly reported case of online blocking occurred in 2005, when a rural telephone company called Madison River blocked competing VoIP calls, our dependence on reliable access to an open Internet - and the costs of unreasonable blocking - has continued to grow exponentially. The broadband environment has become increasingly more complex, and the Congress has already given the FCC a wide variety of tools to address it. In 2005, at the time of the *Madison River* case, no one seriously considered that children in rural areas could not do their homework unless the FCC reformed the Universal Service Fund to promote affordable access. Few people were even aware of bandwidth caps, let alone considering how bandwidth caps might have profound impact on our economy or the future of innovation. Congress in 2005 could not have anticipated that broadband providers might track our every move with “Super Cookies,” or considered the impact of broadband services on our ability to complete phone calls to rural exchanges, the impact of broadband on our 9-1-1 system, or how broadband policy and an open Internet would become a concern in retransmission consent negotiations. But all of these policy considerations, and more, now crowd the FCC’s docket.

Insisting that protections for the open Internet must **include** a ban on paid prioritization, and that net neutrality rules equally to wireless, is not at all the same as saying that these two things are the **only** elements of wise communications policy. To the contrary, as affirmed just last year by a 5-0 vote of the Federal Communications Commission, our communications policy has always embodied the broader fundamental traditional values of service to all Americans, competition, consumer protection, and public safety.⁵ Further, as discussed below, even the Commission’s decisions to reclassify broadband as a Title I service occurred against a backdrop of expectation that it retained the authority to address both potential future conduct that would threaten the open Internet.⁶

As then-Chairman Michael Powell explained in his concurring statement to the *Cable Modem Order*: “The Commission's willingness to ask searching questions about competitive access, universal service and other important policy issues demonstrates its commitment to explore,

⁵ *Technology Transitions, et al.*, GN Docket No. 13-5, et al., 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, 29 FCC Rcd 1433 (2014) (*Technology Transitions Order*).

⁶ *Broadband Industry Practices*, Notice of Inquiry, WC Docket No. 07-52 (2007). See also *id.*, Statement of Chairman Kevin J. Martin; see also, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185; *Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798 (2002) (*Cable Modem Order*), *aff'd*, *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), at ¶¶ 108-112.

evaluate and make responsible judgments about the regulatory framework.”⁷ The draft legislation would, for the first time, remove the ability of the FCC to “make responsible judgments about the regulatory framework.”

Congress Best Succeeds When it Legislates Around Broad Principles and Allows Flexibility for Technological Innovation and Economic Change.

The Communications Act of 1934 has survived so long for the same reason that legislation based on fundamental principles – such as the Federal Trade Commission Act of 1914 and the Sherman Antitrust Act of 1894 – have survived for so long. It relies on broad principles enacted by Congress and flexible administration by an expert agency capable of handling rapid technological and economic change. This focus on fundamental values such as service to all Americans and consumer protection -- rather than focusing on “clarity” and “certainty” around the issues of the moment -- made the United States the undisputed leader in telecommunications policy and technology. We are the nation that put a phone on every farm. We are the nation that invented the modern wireless industry. We are the nation that invented the Internet.

In all these cases, Title II played a vital part in ensuring our global leadership. The *Carterfone* proceeding and the *Computer Inquiries* of the 1970s and 1980s made the modern Internet possible. They also demonstrate the value of rulemaking flexibility. Both proceedings responded to changes in technology Congress could not have predicted in 1934 when it created Title II. Although *Carterfone* was initially a single adjudication, the Commission quickly found this constant case-by-case approach inherently unworkable and detrimental to the evolution of an independent customer equipment market. The Commission therefore shifted to its Title II Rulemaking authority to create network attachment rules, a development widely praised as paving the way for such innovations as the answering machine (the predecessor to modern voicemail service), the fax machine, and ultimately the dial up modem -- the necessary precursor to today’s Internet.⁸

Similarly, the FCC’s initial *Computer* proceedings that created the distinction between “enhanced services” (now “information services”) and telecommunications services took place against a background of changing technology. Again, the Commission first tried to distinguish between “enhanced services” and “telecommunications services” through adjudication.⁹, and again this proved unworkable. Rather than providing the certainty necessary for businesses to innovate and technology to develop, reliance on case-by-case adjudication proved costly, time consuming, and confusing. As a consequence, the Commission adopted a set of bright line rules

⁷ See Cable Modem Declaratory Ruling, Separate Statement of Chairman Michael K. Powell (2002).

⁸ FCC Office of Plans and Policy Working Paper #31, “The FCC and the Unregulation of the Internet, July 1999.

⁹ *Reg. and Policy Problems Presented by the Interdependence of Computer and Communications Services*, Final Decision, 28 FCC 2d 267 (1971) (Computer I).

in its *Computer II* proceeding¹⁰ that allowed a wide range of services, including the dial-up Internet, to flourish. As technology and the marketplace continued to evolve rapidly, the Commission responded in the *Computer III* proceeding¹¹ by relaxing its rules to reflect the breakup of the Bell monopoly and their relevant changes.

When Congress has legislated to exercise appropriate oversight, it has generally recognized the need to preserve regulatory flexibility by enhancing rulemaking authority. Congress' actions in 1993¹², which lay the foundation for the modern wireless industry, illustrate how Congress has exercised its responsibility for oversight and used its legislative authority to direct the Commission. For more than a decade, the FCC struggled to find the appropriate regulatory framework for mobile wireless voice services. The Commission relied on case-by-case adjudication to determine which services were subject to Title II and thus eligible for interconnection rights and access to phone numbers, and which services were not Title II and therefore not eligible for interconnection. (It is important to stress that the nascent wireless industry *wanted* to be classified as a Title II service to gain the pro-competitive benefits of Title II classification.)

The 1993 Act included numerous innovations.¹³ Most importantly, Congress replaced the FCC's case-by-case adjudication with a regulatory classification for "commercial mobile radio service" (CMRS). While specifying the general principle for common definition, it explicitly required that the FCC define the statutory terms via regulation. Congress also explicitly classified CMRS as Title II, but gave the FCC the flexibility to forbear from any provisions that it found unnecessary.

Finally, in 1996, Congress enacted the most sweeping reform of the Communications Act since its inception. In doing so, it benefitted tremendously from more than two decades of FCC rulemaking efforts to introduce competition into the voice and video marketplace. The 1996 Act did not abolish Title II or seek to eliminate FCC rulemaking authority. To the contrary, Congress depended on the FCC to use the combination of Title II rulemaking and forbearance both to shift the industry to a more competitive footing and to ensure that the fundamental values of consumer protection, universal service, competition, and public safety remained central to our critical communications infrastructure.

As these examples show, and as Congress has repeatedly recognized in its periodic updates of the Communications Act, rulemaking authority provides critical flexibility for the Commission

¹⁰ *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384 (1980) (Computer II Final Decision).

¹¹ *In the Matter of Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Phase II Report and Order, 104 F.C.C.2d 958 (1986) (Computer III Phase II Order).

¹² Omnibus Reconciliation Act of 1993, Pub. L. No. 103-66, enacted August 10, 1993.

¹³ For example, the 1993 Act gave the FCC the authority to conduct spectrum auctions, which it left to the FCC to define by rule subject to guidance from Congress on general principles. *See Id.* at § 309(j).

to adapt existing rules to rapidly evolving technology and the ever-shifting marketplace. A statute captures a single moment in time. It works best, therefore, when focused on broad and timeless principles -- fundamental values such as consumer protection, competition, universal service, and public safety -- rather than trying to account for every single detail.

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

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

Measuring The Draft legislation Against This Legislative Background

Both Houses of Congress have already expressed interest in conducting a thorough reexamination of the Communications Act similar to the bipartisan effort that culminated in the passage of the Telecommunications Act of 1996. Today’s draft legislation, unfortunately, resembles the catastrophically unsuccessful Cable Act of 1984. Like the Cable Act of 1984, it has elevated “certainty” over flexibility and focused on today’s headlines rather than on timeless fundamental principles.

Prioritization Was Never The Only Concern For An Open Internet

When the FCC reclassified cable modem service as an information service in 2002, it recognized that it needed to address critical “social policies” such as privacy and universal service.¹⁴ The FCC also relied on its broader authority to address new issues, such as the first case of VoIP

¹⁴ See, e.g., *Cable Modem Order* at ¶¶ 72, 110-112. .

blocking.¹⁵ When the FCC issued its Wireline Reclassification Order¹⁶ and accompanying Open Internet Principles, it simultaneously issued a further notice of proposed rulemaking to address concerns around consumer protection, reliability, national security, disability access, and universal service.¹⁷ Critically, the Open Internet Principles were *never* considered on their own as an adequate replacement for Title II. Rather, in reclassifying broadband as an information service, the Commission assumed it would have sufficient authority – via ancillary authority or through other statutory provisions -- to address consumer protection, disability access, and universal service through future rulemakings.

In 2006, Congress considered legislation similar to the draft legislation here as part of the Communications Opportunity, Promotion, and Enhancement Act of 2006 (COPE Act).¹⁸ Then, as now, the bill proposed to strip the FCC of its regulatory authority and limit the FCC to case-by-case adjudication. Even in 2006, this limitation was considered too drastic and the entire effort to reform the Communications Act crashed on the unwillingness of drafters to allow sufficient flexibility for the FCC. The approach taken in the COPE legislation has grown less suitable with the passage of time.

When the D.C. Circuit made it clear in the *Comcast* case that it intended to dramatically scale back the applicability of ancillary jurisdiction, Public Knowledge was the first organization to urge the FCC to reclassify broadband as a Title II service precisely *because* only Title II could provide adequate authority to protect our traditional fundamental values of consumer protection, service to all Americans, reliability, and competition.¹⁹ Public Knowledge has continued to press for Title II not only as the most straightforward way to prevent blocking or paid prioritization,

¹⁵ *Madison River Communications, LLC and Affiliated Companies*, File No. EB-05-IH-0110, Consent Decree (2005).

¹⁶ *Appropriate Framework for Broadband Access To The Internet Over Wireline Facilities*, CC Docket No. 02-33; *Universal Service Obligations of Broadband Providers, Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337; *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, 1998 Biennial Review -- Review of Computer III ONA Safeguards and Requirements*, CC Docket Nos. 95-20, 98-10; *Conditional Petition of Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) With Regard to Broadband Services Provided By Fiber to the Premises; Petition of Verizon Telephone Companies for Declaratory Ruling Or, Alternatively, For Interim Waiver With Regard To Broadband Services Provided Via Fiber to the Premises*, WC Docket No. 04-242; *Consumer Protection In The Broadband Era*, WC Docket No. 05-271, Report & Order and Notice of Proposed Rulemaking, Policy Statement, 20 FCC Rcd 14853 (2005) (“*Wireline Framework Order*”).

¹⁷ See Wireline Framework Order at ¶¶ 146-159; See also *Statement of Chairman Kevin Martin* (“government will continue to have a role in this dynamic, new broadband marketplace. Together with our state colleagues, the Commission must vigilantly ensure that law enforcement and consumer protection needs continue to be met”); *Statement of Commissioner Kathleen Q. Abernathy* (“The Commission has already made clear its intention to ensure access to emergency services as Americans transition to packet-switched communications technologies, irrespective of how those services are classified under the Communications Act. As we make clear in today's Notice, we will now turn our attention to other "social policy" requirements, such as those involving disability access, slamming, and consumer privacy.”)

¹⁸ 109th Congress, H.R. 5252 & S. 2686.

¹⁹ *Ex parte* Submission of Public Knowledge, GN Docket 09-191 (filed Jan. 28, 2010).

but also as the only way to continue to protect the fundamental values that have made our communications infrastructure the envy of the world.

Congress should therefore follow the successful approach that it took in 1993 when Congress used Title II to lay the groundwork for the current wireless industry,²⁰ and in the approach Congress took in 1996 when it used Title II to create the modern telecommunications market.

The FCC Needs Rulemaking Flexibility

In 2006, both Democrats and Republicans rejected the COPE Act proposal to limit FCC authority over broadband to adjudication of non-discrimination principles. Lawmakers found it inadequate to protect the open Internet and preserve our fundamental values. This approach remains inadequate today. Without rulemaking authority, the FCC cannot address new circumstances that have *already* become part of the public debate. Nor can it address pressing consumer protection issues, as envisioned when the FCC initially classified broadband as an information service.

The lack of rulemaking authority of the Federal Trade Commission is frequently cited as one of the weaknesses of the agency, and specifically one of the reasons why it cannot adequately address concerns about network neutrality. As discussed at length above, while adjudication is a useful tool in specific circumstances, it does not replace the ability of rulemaking to respond to changes in a dynamic marketplace. The process of rulemaking allows all stakeholders to come together in a well-defined and deliberative process subject to judicial review. It allows the FCC to keep itself informed of technological and marketplace developments, and to make necessary adjustments or correct mistakes.

Rulemaking also provides certainty. It ensures consumers can expect the same level of protection for a service regardless of the specific provider or the specific facts of any given case. It simplifies the process of consumer protection for both consumers and the agency. Development of a body of case law takes time, and litigating the first cases can create enormous expense. Rather than creating clarity and certainty, the draft legislation would appear to open the door to endless litigation as the only means to clarify the statutory language. Rather than permitting consumer protections to evolve in concert with the changing broadband marketplace and adjust to changes in technology, the shift to adjudication will create ossification and leave consumers dangerously exposed as a body of relevant case law slowly develops.

As noted above, eliminating the FCC's rulemaking authority would *not* be a return to the status quo, but a dramatic shift. The FCC has always assumed it has rulemaking authority since it first

²⁰ Omnibus Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(b)(2)(A)(iii).

reclassified. When the D.C. Circuit rejected the FCC's theory of ancillary authority in 2010, the FCC switched to a theory of regulatory authority using Section 706 of the 1996 Act.²¹ The FCC has relied on Section 706 authority – which the draft legislation would eliminate – to sustain its ongoing efforts to reform Universal Service and ensure ubiquitous, affordable access to all Americans in accordance with Section 254²², the Broadband Data Improvement Act of 2008²³, and the relevant sections of the American Recovery Act of 2009²⁴.

Even while the FCC considered other sources of rulemaking authority, the FCC explicitly left Title II as an option should it ever become necessary. If Congress intends to remove this option, it needs to provide the FCC with an equally flexible tool to replace Title II.

Congress Cuts Short FCC Authority To Address Vital Public Policies

It is important, therefore, to review the list of consumer protections and pro-competitive policies found in Title II which this draft legislation would foreclose by prohibiting the Commission from classifying broadband as Title II and by eliminating Section 706 as a separate source of authority.

- Consumer privacy (Section 222)
- Truth in billing regulations (derived from Section 201)
- Authority to resolve complaints with regard to overcharges or unreasonable billing practices, deceptive practices, failure to provide adequate facilities to support promised services, or otherwise address consumer protection issues (derived from Section 201)
- Authority to address service to all Americans, carrier of last resort, or refusal to serve based on race, religion, or national origin (Section 202)
- Authority over 9-1-1 (Section 251)
- Authority over interconnection (Section 251)
- Ability to compel broadband providers to report outages, or provide other necessary information to compile relevant information so that the Commission may assess deployment, affordability, ability to support critical services such as 9-1-1 or national defense, impact on small businesses, or otherwise ascertain any pertinent information relevant to wireline broadband deployment. (Sections 214, 215, 218, 256, 257 and 1302 (Section 706))
- Universal Service Fund reform (Sections 254, 1302)
- Disability access (Section 255)

²¹ Now codified at 47 U.S.C. §1302.

²² 47 U.S.C. § 254

²³ Broadband Data Improvement Act of 2008, Pub. L. No. 110-385 (Oct 10, 2008)

²⁴ American Recovery and Investment Act of 2009, Pub. L. No. 111-115 (Feb. 17, 2009).

- Access to pole attachments for broadband providers not offering bundled video or Title II telecommunications (Section 224)
- Liability for acts and omissions of agents, so that companies cannot use contractors or subsidiaries to avoid responsibility for anti-consumer conduct (Section 217)
- Preemption of state regulation (Sections 253, 1302)

As noted above, elimination of Section 706 as a source of regulatory authority would appear to make it effectively impossible for the Commission to collect information necessary to determine whether advanced telecommunications services are being adequately deployed to all Americans in a timely manner, or to otherwise ascertain essential information as to our national broadband infrastructure.²⁵

It is also noteworthy that in 2006, when Congress considered similar legislation as part of COPE, Congress includes a provision expressly preempting state prohibitions on municipal broadband, a provision that enjoyed bipartisan support.²⁶ Here, the legislation proposes to eliminate the primary source of authority for federal preemption of these restrictions without providing any replacement. Given that deployment of competing high-speed broadband systems is generally recognized today as even more critical than it was in 2006, repeal of Section 706 authority without providing any replacement to address this issue would be a step backward from where Republicans and Democrats were on this issue ten years ago.

Problems With Alternative Sources Of Authority.

Proponents of the draft legislation note that the Commission may have other sources of authority to achieve these goals – notably Title III for wireless services and Title VI for cable services. Additionally, proponents of the draft legislation argue that by classifying broadband as an “information service,” that the Commission’s ancillary authority remains intact.

As an initial problem, it is hard to reconcile this defense of the language with the stated goal of providing certainty. Instead of the well-known and established contours of Title II, the legislation would require the Commission to hunt among its possible sources of authority. Even where authority arguably exists, it may apply only to one technology (e.g., wireless, or cable operators) but not others.

Additionally, the judicial expansion of the “common carrier prohibition,” and the judicial hostility to exercise of the FCC’s ancillary authority create further uncertainty. In *Echostar*

²⁵ *Comcast Corp. v. FCC*, 600 F.3d 642, 659 (D.C. Cir. 2009) (interpreting clause stating that Section 256 does not “expand any existing authority” as negating ancillary authority).

²⁶ H.R. 5252, § 4.

Satellite LLC v. FCC,²⁷ the D.C. Circuit held that because ancillary authority is not “delegated by Congress,” the court will not defer to any Commission use of ancillary authority under *Chevron*.²⁸ The loss of *Chevron* deference for FCC actions using ancillary authority significantly undermines its usefulness as a source of authority and invites judges to substitute their own judgment for that of the agency – hardly a recipe for clarity and certainty.

The same is true of the common carrier prohibition. The D.C. Circuit has issued two opinions that shed light on what constitutes a “core common carrier obligation” that the FCC may not impose on an information service.²⁹ It has limited the usefulness of this guidance by saying that any too rigid or inflexible application of a rule could transform it into a “common carrier obligation” and leave enforcement open to an “as applied” challenge.³⁰ Again, this seems a recipe for confusion and chaos rather than clarity and certainty.

Finally, we cannot ignore the enormous preclusive effect Congress has when it acts. This legislation explicitly proposes to severely curtail and limit the scope of FCC authority over broadband Internet access service, and shield broadband providers from the consumer protections in Title II. Any attempt by the FCC to protect consumers using other sources of authority would need to overcome the argument that Congress deliberately intended to foreclose Commission action and limit it to the language of this specific provision.

Example: How The Draft Legislation Effectively Curtails FCC Jurisdiction Over Interconnection

Although the language does not explicitly eliminate any FCC authority over interconnection, it eliminates any application of Section 251³¹ to broadband or any other “advanced telecommunication service” by prohibiting Title II classification. It is hard to see how the FCC could find authority for any jurisdiction over broadband interconnection under this statute. Even if it did find jurisdiction under a theory of ancillary authority or from some other source, interconnection is a quintessential common carrier obligation. Finally, even if the FCC found jurisdiction, and promulgated an interconnection rule sufficiently vague to avoid the common carrier prohibition, the FCC would face the argument that this is precisely the sort of regulation Congress intended to prohibit when it passed the draft legislation.

²⁷ 704 F.3d 992 (D.C. Cir. 2013).

²⁸ *Id.* at 998 n.3. Additionally, the case takes a generally narrow view of the FCC’s ability to enforce device attachment rules through 629. The case is generally instructive of the narrow way the D.C. Circuit has read the Commission’s Title VI authority, suggesting why it would be unduly optimistic to rely on anything in Title VI as a source of authority for broadband.

²⁹ *Cellco v. FCC*, 700 F.3d 534 (D.C. Cir. 2013); *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

³⁰ *Cellco v. FCC* at 548-549.

³¹ 47 USC § 251.

The Draft Legislative Language Does Not Appear To Address Existing Forms of Discrimination, Let Alone Provide Adequate Authority For Future Forms Of Discrimination Or Other Threats To The Open Internet.

Additionally, the language proposed to address threats to the open Internet does not address conduct that would have been reachable under the Commission's 2010 rules. In this regard, the draft legislation is clearly a step backward, rather than a step forward, and does not appear to comport with the traditional understanding of network neutrality.

By changing the broader principle of 'no discrimination' into the very narrow and limited case of 'no paid prioritization or throttling,' the draft legislation falls short of even the inadequate rules of 2010, let alone the more robust protections offered by Title II. For example, these rules would not have prevented AT&T from limiting FaceTime to particular tiers of service – as it tried to do in 2012. It would not address discriminatory use of data caps, such as Comcast has used to favor its own streaming content over that of rivals. It would not address potential issues arising at Internet interconnection, the gateway to the last mile. Even worse, by eliminating any flexibility on rulemaking or enforcement, the bill would prevent the FCC from addressing any new forms of discrimination and threats to openness that arise.

If the proposed rule cannot even stop forms of discrimination we've already seen, how can it possibly protect the open Internet going forward?

Furthermore, the exemption for specialized services combined with the lack of rulemaking authority creates a potential loophole to sell prioritized service to specific applications or content simply by calling these fast lanes "specialized services." It is true that the FCC's 2010 rule had a similar loophole, but the FCC announced it would continue to address this with future rulemakings. This draft legislation creates the same loophole, but strips the FCC of the power to plug it. While the draft legislation prohibits specialized services that are *clearly* a sham, it gives the FCC no power to define this and leaves open specialized services that effectively create fast lanes but with some fig leaf alternative explanation.

The Draft Legislation Creates An Enormous Loophole For Censorship and Surveillance.

The language of the draft legislation also creates a significant loophole that could allow censorship, surveillance, or other actions that thwart the Internet's openness under the guise of preventing copyright infringement or any other "unlawful activity." A bill that would permit ISPs to inspect and discriminate among Internet traffic so long as they can argue they are simply engaging in "reasonable efforts" to prevent infringement or illegal activity could do irreparable damage to any Congressional or agency efforts to protect an open Internet.

Although the FCC has in the past included limited exceptions to its open Internet rules for copyright measures,³² this is significantly less worrisome than the draft legislation. An agency creating a rule with an exception for copyright infringement is worlds apart from a law that prevents the expert agency from using *any* authority to act against discriminatory behavior if the ISP can argue its efforts were designed to prevent infringement or any other illegal activity.

This is not just an academic distinction. After all, the litigation that sparked multiple rounds of agency rulemakings on net neutrality was centered around Comcast limiting access to peer-to-peer applications like BitTorrent, regardless of the legality of the actual content being transmitted.³³ It is not so difficult to imagine actions that explicitly or implicitly favor established content distributors at the expense of technologies or platforms that could potentially be used to infringe copyright, with carriers using the copyright infringement loophole of the draft legislation to circumvent open Internet enforcement.

Additionally, by elevating this exception in statutory language, Congress would invite others to use this provision well beyond its intended purpose. For Congress to affirmatively create such an exception, despite already stating that open Internet rules are subordinate to existing laws governing law enforcement access, the statute appears to create permission for unlawful surveillance. Because broadband Internet access is the basis for provision of voice-over-IP services protected by Section 222, and other electronic communication protected by ECPA³⁴, this apparent invitation for broadband access providers to ‘voluntarily’ spy on their customers risks undermining Congress’ ongoing efforts to balance civil liberties with law enforcement and national security concerns.

Similarly, by uniquely elevating intellectual property within the context of the Communications Act, the draft legislation may be argued to expand the requirement for broadband operators to take measures to read and intercept arguably infringing traffic well beyond the existing safe harbor requirements under the Digital Millennium Copyright Act³⁵ and the Communications Decency Act.³⁶ Unlike regulatory language, which is often merely explanatory and clearly limited, it is a canon of statutory interpretation that every word of legislation is to be given substantive meaning. Congress should not create new ambiguities and uncertainties in an already contentious area of law.

³² See *Preserving the Open Internet*, GN Docket No. 09-191, *Broadband Industry Practices*, WC Docket No. 07-52, Report and Order, ¶ 111, Appendix A § 8.9 (Dec. 23, 2010) (“Nothing in this part prohibits reasonable efforts by a provider of broadband Internet access service to address copyright infringement or other unlawful activity.”).

³³ Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications (Nov. 1, 2007), https://www.publicknowledge.org/pdf/fp_pk_comcast_complaint.pdf.

³⁴ 18 U.S.C. §2701 *et seq.*

³⁵ 17 U.S.C. §512.

³⁶ 47 U.S.C. §230(c)(1). The breadth of the bill’s exception for efforts targeted at any “other unlawful activity” not only encompasses alleged copyright infringement, but a wide range of allegations, including defamation, misappropriation, discrimination, breaches of contracts, and a host of others.

Precluding the Use of Title II Through Legislation Raises Serious Concerns.

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

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