Question for the Record
Senator Brian Schatz
"Protecting the Internet and Consumers through Legislative Action"
January 21, 2014

Question 1. **I believe that the FCC needs to have ongoing, flexible authority over broadband. I am concerned that the draft legislation does not preserve that type of authority. What changes can – or should – be made to the draft that would address this concern?**

Answer: The Multicultural Media, Telecom and Internet Council ("MMTC") urges Congress to preserve the Federal Communications Commission's Section 706 authority to regulate advanced communications capabilities, including broadband. The FCC is the expert agency; as such, the Commission regularly examines the state of the industry and creates benchmarks for our current and future success. The Commission should retain the authority to set standards to regulate the broadband industry in a flexible and responsive manner, and institute the appropriate consumer enforcement. Specifically, the legislation should set forth the appropriate statutes that support open Internet rules that can be enforced through Section 706 authority. This authority to regulate broadband will impact the Commission's ability to prohibit redlining, protect universal service reform, and ensure a robust public safety network.

Senator Cory Booker
Senate Subcommittee on Communications, Technology, and the Internet
"Protecting the Internet and Consumers through Congressional Action" hearing held on Wednesday, January, 21, 2015

Question 1. **One aspect largely absent from the debate on Chairman Thune's proposed neutrality legislation is the issue of interconnection. Interconnection is not covered under current legislation.**

Answer: The fact that the bill does not specifically mention interconnection is not surprising or troubling. Policymakers have long viewed interconnection issues as fundamentally distinct from regulatory initiatives aimed at promoting Internet openness—which have always focused on the mass-market, retail broadband service offered to *end users*, not on the longstanding, commercial traffic-exchange relationships among network providers upstream. The *2010 Open Internet Order* expressly excluded interconnection from the scope of its rules, and the NPRM proposes to maintain that approach going forward. FCC Chairman Wheeler likewise has expressed the view on numerous occasions that interconnection is not the same issue as net neutrality and should be considered separately. President Obama's statement also signaled a preference for addressing interconnection by requiring additional disclosures and network transparency, and I believe that the draft bill appears to follow this same approach.

Question 1a. **Do you believe that interconnection points can be choke points to the Internet highway?**

Answer: Yes, there can be congestion at interconnection points, but it is highly unlikely that they could be used as choke points to the Internet highway. It is my understanding that network congestion can be caused by either the ISP or the edge content provider that decides how and when it sends traffic to the interconnection points. The FCC record establishes that those who want to put content online have more ways to get that content to end users than ever before. There are multiple routes onto the major ISPs' networks, so anyone can get their content delivered to an ISP's customers without any direct commercial relationship with that ISP. And larger Internet content providers that do want direct connectivity now appear to be arranging for such connections.[1] In addition, Internet interconnection points have always occurred through non-regulated, commercial arrangements. This approach has allowed the Internet to grow rapidly and support increasing access speeds. The competitive marketplace for interconnection – whether via backbone transit providers, content delivery networks and direct peering arrangements – has resulted in the rapid decline in the cost of Internet transit which has, in turn, enabled high-bit-rate applications, such as streaming video.

Question 1b. **Under the proposed legislation, how would interconnection issues be addressed?**

Answer: As explained above, I read the bill as correctly declining to impose affirmative restrictions on interconnection. The FCC could also adopt disclosure requirements relating to interconnection from both ISPs and content providers.

---

[1] *See e.g.* Edward Wyatt and Noam Cohen, Comcast and Netflix Reach Deal on Service, *The New York Times* (Feb. 23, 2014), available at http://www.nytimes.com/2014/02/24/business/media/comcast-and-netflix-reach-a-streaming-agreement.html?_r=0 (last visited Feb. 4, 2015).

Question 2. **Students, health care providers, and entrepreneurs have benefited greatly from innovative online platforms and the free flow of information. I fear that, without strong net neutrality rules, a "tiered Internet" could emerge, creating barriers for innovators and small businesses.**

Answer: All of these segments mentioned, and many more, have exponentially benefitted from broadband and the platforms that private investment and build out have enabled. It is apparent that clear rules on open Internet are required, but they also need to be flexible enough to accommodate new businesses models that may help low-income communities realize the relevance of broadband services and increase adoption. For example, MMTC, along with a host of other civil rights organizations, have advocated against "paid prioritization" if it results in a "tiered Internet." However, MMTC has also worked with companies, like T-Mobile, to increase service offerings for low-income consumers that might make it more attractive – and less expensive – for their low-income customers to adopt the technology.[2] Further, it is unclear how Title II rules will impact small businesses, as the Commission has not undertaken sufficient small business economic impact studies. For example, the Wireless Internet Service Providers Association (WISPA) recently reiterated its concern over deficiencies in the FCC's handling of its Regulatory Flexibility Act requirements and the resulting lack of economic impact analysis for open Internet regulations on small businesses, stating, "the significant economic impact of any new open Internet regulations has not been given full, fair and appropriate consideration by the Commission."[3]

Question 2a. In the absence of strong anti-discrimination protections provided under Title II, and without Section 706 authority, what tools does the FCC have to prevent discriminatory practices and differential treatment we all agree should be prohibited?

Answer: MMTC has strongly advocated for the use of Section 706 authority with a Title VII enforcement mechanism, modeled after the Civil Rights Act, to ensure an open Internet. MMTC has argued that these policy tools, coupled with a presumption against paid prioritization, and a strong enforcement program, will facilitate the Commission's adoption of *smart net neutrality* rules that meet the goals of transparency and equity, while fostering broadband adoption and informed use. In our July filing with the FCC, MMTC, in partnership with 45 national civil rights organizations ("collectively, National Minority Organizations"), proposed a straightforward approach exercising Section 706 authority that included:[4]

- The immediate reinstatement of no-blocking rules to protect consumers.
- The creation of a new rule barring commercially unreasonable actions, while affording participants in the broadband economy, particularly minority entrepreneurs, the opportunity to enter into new types of reasonable commercial arrangements and, through monitoring by the FCC's Office of Communications Business Opportunities (OCBO), ensuring that minority entrepreneurs are never overlooked by carriers seeking to develop these new commercial arrangements.

---

[2] *See e.g.* Statement of David Honig, President and CEO, Minority Media and Telecommunications Council, RE: T-Mobile's Music Freedom Program (Aug. 27, 2014), available at http://mmtconline.org/wp-content/uploads/2014/08/MMTC-Statement-TMobile-Music-Freedom-082714.pdf (last visited Feb. 4, 2015).

[3] *See* Wireless Internet Service Providers Association, Ex Parte Presentation, GN Docket No. 14-28 (Feb. 3, 2015).

[4] *See* Comments of the National Minority Organizations, GN Docket Nos. 14-28 and 10-127 (July 18, 2014).

- The establishment of a rebuttable presumption against paid prioritization that protects against "fast lanes" and any corresponding degradation of other content, while ensuring that such presumption can be overcome by business models that sufficiently protect consumers and have the potential to benefit consumer welfare (e.g., telemedicine applications). Any prioritized service that overcomes the presumption would remain subject to enforcement, and consumers would be able to obtain rapid relief by working with the Ombudsperson and/or through the complaint process based on Title VII of the 1964 Civil Rights Act, discussed in more detail at the end of this response.
- The need to underscore the need for transparency. Enforceable disclosure requirements are the key to consumer protection online.
- Section 706 can also be used to punish bad actors, especially those engaged in blocking, as the D.C. Circuit Court confirmed in *Verizon v. FCC*, the Commission has the authority to do.

MMTC has also proposed that Section 706 look to stronger enforcement mechanisms to effectively resolve consumer complaints. Drawing from the U.S. Equal Employment Opportunity Commission (EEOC), Title VII of the Civil Rights Act of 1964 ("Title VII") could be imported into the FCC's Internet regulatory process under Section 706 of the Telecommunications Act of 1996. The EEOC's complaint process serves a vital role in resolving most employment discrimination complaints before they reach the court system. By encouraging voluntary mediation and informal settlement, the EEOC reduces the strain on judiciary while promoting swift resolution of discrimination claims. At the same time, the EEOC retain the ability to investigate and pursue legal action against employers that have violated Title VII. If no action is taken, individuals can pursue their legal claims privately through civil law suits. In doing so, the EEOC complaint process acts as a first line of defense against Title VII violations, guaranteeing that individuals will have their complaints heard by the EEOC or will be free to proceed on their own.

In the same way, this process, if adapted to open Internet enforcement, could be the first line of defense for consumers who believe they are aggrieved by an apparent violation of Internet openness. The Title VII framework would provide the FCC with a flexible and enforceable legal framework, a clearly established set of factors and guidance, and mechanism to allow the FCC to evaluate challenged practices on a case-by-case affordably, efficiently and expeditiously. Such a procedure should help alleviate any misimpression that Section 706 is insufficiently muscular to preserve Internet openness, while at the same time building consumer confidence in the FCC's stewardship of the open Internet.[5]

Instead of relying on a more formal complaint process under Section 208, the Title VII model would allow a complaint to provide the Commission with enough information to make out a prima facie case of specific or systemic harm, allowing the Commission to conduct an initial screening and, if the Commission's staff issues a non-precedential finding of probable cause, the agency may institute expedited enforcement or mediation. This model would provide consumers with an efficient, affordable and expedited means of pursuing alleged rule violations and other claims against providers.[6]

---

[5] *See* FCC Filing Dockets 14-28 and 10-27, "Application of the EEOC Complaint Process to 1996 Telecommunications Act Section 706 Complaints Regarding the Open Internet," September 18, 2014.
[6] *See* FCC Filing Dockets 14-28 and 10-27, "Application of the EEOC Complaint Process to 1996 Telecommunications Act Section 706 Complaints Regarding the Open Internet," September 18, 2014.

Question 3. **As currently drafted, what protections does the legislation provide that broadband reclassification would not?**

Answer: The legislation would significantly establish an outright ban on paid prioritization—one that the FCC likely could not adopt under Title II of the Communications Act. According to several experts, service differentiation will not be entirely banned under Title II. Sections 201 and 202 of the Communications Act—the two provisions of Title II that some have cited as support for rules addressing paid prioritization—each require the FCC to engage in a highly fact-specific, contextual analysis of whether particular conduct is "just and reasonable," and thus could not be used to adopt the sort of categorical ban on paid prioritization appearing in the legislation.

Question 4. **Do you believe, as the draft legislation suggests, the FCC should not be able to claim any authority under Section 706 of the Telecommunications Act of 1996?**

Answer: No. The FCC is the expert agency and, as such, should be able to exercise flexible authority that is responsive to our changing information needs. We believe that there should be movement towards a legislative compromise that preserves FCC's Section 706 Authority to ensure the implementation and enforcement of net neutrality rules.

Question for the Record
Senator Joe Manchin
"Protecting the Internet and Consumers through Legislative Action"
January 21, 2014

Question 1. **During the hearing, I received conflicting information about how the Chairman's proposed legislation would impact Universal Service Fund (USF) broadband programs like the Connect America Fund (CAF) that help private companies make investments and expand their network into rural, underserved areas. Due to the importance of these programs to my state and the communities I represent, I am requesting a written explanation of the anticipated impacts this bill would have on USF programs from each of the witnesses, specifically:**

Question 1a. **What authority or authorities does the Federal Communications Commission currently rely on to operate and execute USF programs like the Connect America Fund?**

Answer: The FCC's USF and CAF programs principally rely on Section 254 of the Communications Act, which governs contributions to and disbursements from these programs, and Section 214 of the Act, which establishes eligibility criteria for carriers seeking support.

Question 1b. **Without either Section 706 of the Telecommunications Act of 1996 authority or Title II of the Communications Act of 1934 authority, as proposed in the draft legislation, under what authority, if any, could the FCC incentivize broadband deployment?**

Answer: The legislation would not change the status quo regarding the FCC's USF and CAF programs. Those programs today play a vital role in promoting broadband deployment—and do so *without* classification of broadband Internet access services as a Title II service. The obligation of telecommunications carriers to contribute to those programs, and the ability of those programs to support broadband deployment, would remain the same.

Question 1c. **What would happen to the Connect America Fund and similar programs should this legislation pass in its current form?**

Answer: I believe that nothing will happen to these programs if the legislation passed. As noted above, since the CAF was established, the program has been successful at promoting broadband deployment, and all the while broadband Internet access service has been classified as an information service. The legislation would leave that current classification in place, and thus would not affect CAF support going forward.

Response: All Witnesses

Question 2. **One of the primary concerns I have about the proposal we are discussing today is the removal of all rulemaking authority. Businesses need certainty, and rulemaking allows businesses to understand how the general goals and standards Congress establishes in law – such as affordable and accessible Internet – will be specifically applied before they make investment decisions. The proposed bill removes all the transparency requirements included in rulemaking and replaces them with a new, retroactive, case-by-case rulemaking process that could be very difficult for small start-up businesses to understand. Without rulemaking, how would entrepreneurs understand how the FCC would apply the mandates of this bill to particular circumstances?**

Answer: The D.C. Circuit Court made clear in *Verizon v. FCC* that "[S]ection 706 of the Telecommunications Act…furnishes the Commission with the requisite affirmative authority to adopt [open Internet] regulations." In 2012, the D.C. Circuit Court unanimously upheld the transparency rule as a valid exercise of the FCC's authority under Section 706. The D.C. Circuit Court also made clear that Section 706 would support the adoption of appropriately tailored rules prohibiting blocking of online content and requiring "commercial reasonableness" in business relationships between ISPs and edge providers. The "commercial reasonableness" standard can be likened to core Title II standards requiring just and reasonable terms and conditions, and prohibiting unreasonable discrimination without the substantial burdens and uncertainty created by common carrier regulations. We should be following the D.C. Circuit Court's roadmap for new open Internet rules under Section 706, whereas the FCC can preserve the flexibility needed for regulating Internet access without needlessly creating legal risk and uncertainty.

Question 2a. **What opportunities would businesses and consumer groups have to weigh-in on the FCC's application of these rules going forward?**

Answer: Businesses and consumer groups would have the opportunity to participate in any rulemaking proceeding that the FCC undertakes to adopt rules implementing the statutory requirements. In such a proceeding, the FCC likely would need to develop a clear understanding of certain concepts in the legislation (e.g., what constitutes "blocking," what kinds of "network management" are "reasonable," etc.), and businesses and consumers groups would be able to share their insights on those matters. Moreover, businesses and consumer groups could weigh in on any future petitions seeking declaratory rulings or other guidance under the legislation. Such parties might also have the opportunity to provide input on adjudicatory proceedings, to the extent the FCC opens aspects of those proceedings to public comment.

Question 2b. **How could any changes, however small, even be made to reflect the specific concerns of entrepreneurs or small businesses with the explicit prohibition on expanding Internet openness obligations included in Subsection (b) the draft bill?**

Answer: Even if the FCC cannot *impose* substantive restrictions beyond those in subsection (b) of the draft bill, it still would be accorded deference in *interpreting* the restrictions in the legislation itself. And as the FCC considers how to interpret aspects of the legislation (*e.g.*, the meaning of "blocking" and "reasonable network management"), it will be obligated to consider the input of entrepreneurs, small businesses, consumer groups, and others who submit their views to the agency.

CONGRESSIONAL RECORD QUESTIONS

Senator Deb Fischer
Written Questions for the Record to
Dr. Nicol Turner-Lee
"Protecting the Internet and Consumers through Congressional Action"
Senate Committee on Commerce, Science, and Transportation
Wednesday, January 21, 2015

Question 1 – To All Witnesses – While the FCC is in the process of ensuring net neutrality, some want the FCC to impose all of these obligations under the guise of ensuring consumer protection. Some argue that common carrier requirements on broadband providers should include almost most all of Title II, in addition to Sections 201, 202, and 208. Specifically, some activists have suggested the following parts of Title II must be applied to the broadband industry:

UNIVERSAL SERVICE
Sec. 214. [47 U.S.C. 214] Extension Of Lines
Sec. 225. [47 U.S.C. 225] Telecommunications Services for Hearing-Impaired and Speech-Impaired Individuals.
Sec. 254. [47 U.S.C. 254] Universal Service.
Sec. 255. [47 U.S.C. 255] Access by Persons With Disabilities.

CONSUMER PROTECTION
Sec. 217. [47 U.S.C. 217] Liability of Carrier for Acts and Omissions of Agents.
Sec. 222. [47 U.S.C. 222] Privacy Of Customer Information.
Sec. 230. [47 U.S.C. 230] Protection for Private Blocking and Screening of Offensive Material.
Sec. 258. [47 U.S.C. 258] Illegal Changes in Subscriber Carrier Selections.

COMPETITION
Sec. 224. [47 U.S.C. 224] Regulation of Pole Attachments.
Sec. 253. [47 U.S.C. 253] Removal of Barriers to Entry.
Sec. 251. [47 U.S.C. 251] Interconnection
Sec. 256. [47 U.S.C. 256] Coordination for Interconnectivity.
Sec. 257. [47 U.S.C. 257] Market Entry Barriers Proceeding.

Do you agree or disagree that these sections of Title II common carrier regulation are needed? If you agree, please explain why.

ANSWER: I disagree that Title II is needed. The Internet has developed into the transformative medium it is today without the application of any of these provisions to broadband Internet access. Indeed, MMTC believes that the Internet's astounding rise over the past two decades is directly attributable to the light-touch regulatory approach taken by the FCC to broadband.[7]

Access to the Internet has provided so many great opportunities for Americans across the board. The Internet in America has become the marvel of the world as consumers benefit from

[7] *See* David Honig, Esq. & Nicol Turner-Lee, Ph.D., MMTC, *Refocusing Broadband Policy: The New Opportunity Agenda for People of C*olor 7-8 (Nov. 21, 2013) ("MMTC White Paper"); Comments of the National Minority Organizations, GN Docket Nos. 14-28 and 10-127 (July 18, 2014).

telehealth, educational endeavors, civic engagement, and free speech opportunities that have empowered their lives and provided myriad opportunities to achieve and grow. Today's competitive broadband marketplace works well and has helped ensure those opportunities continue to be available to those who need it most.

The reason the Internet has become so dynamic and powerful in our lives is due to the decades-old bipartisan approach begun under President Clinton in which the government made the wise decision to allow the Internet to proliferate, innovators to create and consumers to benefit. It is this consumer-oriented and investment-focused approach that has brought us today's Internet.

A high quality broadband connection provides essential resources and tools for more vulnerable populations that include the poor, people of color, people with disabilities, those without a high school education and seniors. The Internet and Internet-enabled technologies, applications and services make it possible for these groups to leverage data, voice, video and social media to solve chronic and persistent problems. We need the Internet to be the aspiration for these communities, and avoid a collision course that is mired by years of legal and political disputes.

As technology advances and brings various new apps and online services that improve quality of life for so many people, it's important that regulators do their best to make these services available to as many people as people. I do not believe that Title II is the best regulation to ensure this happens.

MMTC, and our partnership of leading civil rights organizations, support the values of the open Internet, particularly those expressed by the Administration. The focus as we see it should be on how to close the digital divide and how to bring advanced, high-speed broadband to all Americans. We believe that the enactment of Title II regulations will exacerbate the problem that we all should be attempting to solve.