STATEMENT
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# "PROTECTING THE INTERNET AND CONSUMERS THROUGH CONGRESSIONAL ACTION"

BEFORE THE
UNITED STATES SENATE
COMMITTEE ON COMMERCE, SCIENCE & TRANSPORTATION

JANUARY 21, 2015

## OVERVIEW

Chairman Thune, Ranking Member Nelson and distinguished Members of the Committee, thank you for having me testify before you today. My name is Robert McDowell. From 2006 until 2013, I served as a Commissioner of the Federal Communications Commission (FCC). Currently, I am a partner of the internationally recognized law firm of Wiley Rein LLP. I am also a Senior Fellow at the Hudson Institute's Center for Economics of the Internet, a non-profit, non-partisan policy research organization. Nonetheless, I am not testifying today on behalf of any client of Wiley Rein or on behalf of the Hudson Institute. The opinions I express today are strictly my own.

I am especially honored to be testifying at the first substantive hearing of this Committee in the 114th Congress. From my biased perspective, it is quite appropriate that your first hearing is focused on the future of Internet freedom.

I have always supported policies that promote an open and freedom-enhancing Internet. That is precisely what the American private sector built as the result of long-standing and bipartisan public policy that insulated the Net from unnecessary regulation.

During my tenure at the FCC, the issue of government regulation of Internet network management, or "net neutrality," came before me several times in a variety of contexts. I am deeply familiar with the arguments for and against new regulations in this area. I voted against the Commission's first two attempts to issue new rules for many reasons, not the least of which was that the FCC was reaching beyond the powers Congress gave it. Each time, the appellate courts largely agreed and largely struck down the FCC's attempt to regulate in this space.[1]

[1] *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014); *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

The 114th Congress has a historic opportunity to end the debate by forging ahead with a legislative alternative.

In the meantime, however, the FCC faces one of the most important questions in its 80-year history: are its intentions to protect an open Internet, or merely to establish its unlimited power over the entire Internet ecosphere? FCC Chairman Tom Wheeler says we will have an answer on February 26.

As he said at the Consumer Electronics Show on January 7, his preference is to depart from Clinton-era bipartisan policy and classify the Internet as a "utility" using Title II of the Communications Act of 1934.[2] Chairman Wheeler noted that while the Commission initially considered a regulatory approach under Section 706, such an approach – based on a "commercially reasonable" standard – was deemed insufficient because "commercially reasonable could be interpreted as what is reasonable for the ISPs, not what's reasonable for consumers or innovators."[3] Instead, Chairman Wheeler indicated that the Commission will impose the Title II "just and reasonable" standard.[4]

I am deeply familiar with Title II, having studied its mandates for seven years as a senior Commissioner on the FCC and as an attorney for more than 24 years in the telecommunications arena. I can say with confidence that bringing down the blunt "command-and-control" sledge hammer of Title II onto the Internet will eventually cause collateral damage to America's tech economy.

As "tech" and "telecom" companies morph to look like each other by deploying their own massive fiber and wireless networks embedded with software and content to better serve

[2] 47 U.S.C. § 201 *et seq*.

[3] Hon. Tom Wheeler, Chairman, FCC, Address to the 2015 International Consumer Electronics Show (Jan. 7, 2015).

[4] *Id.* (noting that the FCC will "propose rules that say no blocking, no throttling, [and no] paid prioritization," and that the "yardstick against which behavior should be measured . . . is just and reasonable").

consumers, Title II will end up regulating all such companies under its "mother-may-I-innovate" dictates. The Supreme Court said as much in 2005 in its *Brand X* decision.[5]

Furthermore, as the Progressive Policy Institute determined last year, Title II regulation of the Net could trigger state and local regulations, taxes and fees costing consumers "a whopping $15 billion" a year. And that's "on top of the adverse impact on consumers of less investment and slower innovation that would result" from Title II.[6]

And make no mistake, trying to refrain, or "forbear," from applying most of Title II's approximately 1,000 heavy-handed requirements while selecting only a few, as proposed by Chairman Wheeler, will make an FCC order impossible to defend in court because the picking and choosing between who gets regulated and who does not will look arbitrary and politically-driven to appellate judges.

The tragedy of this debate is that no one, including phone, wireless and cable companies, has ever contested the goals of keeping the Internet open. It has been open and freedom-enhancing since it was privatized in the mid-1990s due to market forces and protections under existing antitrust and consumer protection laws. Instead, the fight has devolved into a question of how overreaching and heavy-handed the FCC would be in pursuing its ostensible goals.

It's time to choose a different path and put to rest this debate. Although I still hope for a comprehensive rewrite of our nation's communications laws, the legislation being considered today has the potential to provide all sides with a way out.

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[5] *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 994 (2005) ("[Reclassification] would subject to mandatory common-carrier regulation all information-service providers that use telecommunications as an input to provide information service to the public.").

[6] Robert Litan and Hal Singer, *Outdated Regulations Will Make Consumers Pay More for Broadband*, Progressive Policy Institute, at 1 (Dec. 1, 2014).

For net neutrality supporters, they would achieve their long-sought-after goals of: adding protections for consumers and tech start-ups; ensuring Internet service providers could not unlawfully block or throttle content and applications or impose anticompetitive paid prioritization requirements; creating Congressionally-defined enforcement authority for the FCC in this space, and more. They would also be able to enjoy, for the first time, the *certainty* that a court cannot hand them another loss, or that a future FCC could not roll back the rules.

For opponents of new FCC rules, the bill would: take the specter of Title II off the table; restore regulatory certainty; protect freedom of speech; clip the FCC back onto its Congressional leash so it can't regulate the entire Net; and create a legal firewall that would protect investment and innovation in the computer network infrastructures that underpin the Internet ecosphere.

The unelected FCC stands at a fork in the road. If it rushes down the Title II lane, it will own the consequences: decreased investment, a hobbled tech sector, new taxes and fees on consumers and global regulators emboldened to regulate the Net like an old-fashioned phone company as well.[7] Going in this direction would reveal that having full power over the Net economy was what the FCC really wanted all along.

In the other direction, however, the FCC can attain its and the White House's stated policy goals, be protected by Congressional action, and bask in the glow of achieving a bipartisan consensus of historic proportions. The future of the Internet, and America's digital economy, deserve no less.

[7] Expansion of the government's reach into the operations of the Internet is only providing cover and encouragement to foreign governments as well as multilateral and intergovernmental institutions that want to have, as Vladimir Putin said, "international control of the Internet." Vladimir Putin, Prime Minister of the Russian Federation, Working Day, *Prime Minister Vladimir Putin Meets with Secretary General of the International Telecommunications Union Hamadoun Touré*, GOV'T OF THE RUSSIAN FED'N (June 15, 2011), *available at* http://premier.gov.ru/eng/events/news/15601/.

## EXTENDED ANALYSIS

**CLASSIFYING BROADBAND AS A "UTILITY" –STYLE COMMON CARRIER UNDER TITLE II OF THE COMMUNICATIONS ACT OF 1934 WOULD GENERATE LITIGATION AND UNCERTAINTY, CAUSE UNINTENDED CONSEQUENCES AND UNDERMINE GROWTH IN THE ENTIRE INTERNET ECOSYSTEM.**

The notion that retrofitting Title II, an antiquated – but powerful – 80-year-old statute designed for the copper-based, analog, voice-only phone monopolies of the early 20th Century, would somehow be good for the dynamic and ever-evolving Internet ecosphere is a faulty premise. Title II has the potential to be devastating to the entire Internet ecosystem. While I was a Commissioner, I kept my grandmother's 1950's black rotary-dial phone from San Angelo, Texas in my office as a reminder of the lack of innovation and investment produced by Title II. The law erroneously presumed that a natural monopoly for telecommunications would always exist and, accordingly, it froze in place the technologies of the day. As a result, America was denied the benefits of entrepreneurial risk taking such as new investment, innovation, lower prices and improved consumer choice. Over time, markets, regulators and legislators were able to create a deregulatory environment that fostered a virtuous cycle of investment and innovation that obviated the need for regulation.

During my 24 year career in the telecommunications space, I have become quite familiar with the Communications Act. As the FCC moves forward with its plan to impose Title II onto the Internet, even if ostensibly "lightly,"[8] I am deeply concerned about the ramifications of excavating an ancient law that was written when people held their phones in two hands and applying it not only to America's beautifully chaotic tech sector but also to technologies and services that have not yet been invented.

[8] *See* Wheeler, *supra* note 3.

As a threshold matter, FCC Chairman Tom Wheeler's proposal to apply sections 201 and 202[9] to Internet access will inevitably lead to litigation. Not only will the legality of the FCC's new order be challenged, but subsequent enforcement actions will be as well.

Let's allow history to be our guide. Since being signed into law by President Franklin D. Roosevelt in 1934, the principles underpinning sections 201 and 202 have spawned nearly 400 court cases.[10] The first appellate case was decided in 1936[11] and the most recent appellate court decision was handed down in 2012.[12] Additionally, as the result of decades of administrative litigation, the FCC itself has issued over 1,000 decisions attempting to apply the same "just and reasonable" standard Chairman Wheeler proposes today.

In short, the term "just and reasonable" is perhaps the most litigated phrase in telecommunications jurisprudence. Is this what we want America's 21st Century tech policy to look like? And I say this as an attorney, with all due respect to my fellow practitioners: do we

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[9] *Id.*

[10] This estimate of court cases was determined by researching cases citing the "just and reasonable" or "unjust or unreasonable" standards in the context of sections 201(b) and 202(a) of the Communications Act. The cases included in this estimate vary with respect to the depth of analysis involved and provide a general context as to the amount of litigation sections 201 and 202 have spawned over the years. *See, e.g.*, *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 47 (2007); *Ambassador, Inc. v. United States*, 325 U.S. 317, 323 (1945); *AT&T Co. v. United States*, 299 U.S. 232, 246-47 (1936); *Cellco P'ship v. FCC*, 700 F.3d 534, 548 (D.C. Cir. 2012); *Virgin Islands Tel. Corp. v. FCC*, 444 F.3d 666, 669-70 (D.C. Cir. 2006); *AT&T Corp. v. FCC*, 448 F.3d 426, 435 (D.C. Cir. 2006); *Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 372 F.3d 454, 456, 460 (D.C. Cir. 2004); *Orloff v. FCC*, 352 F.3d 415, 419 (D.C. Cir. 2003); *Hi-Tech Furnace Sys., Inc. v. FCC*, 224 F.3d 781, 792 (D.C. Cir. 2000); *Bell Atlantic Tel. Co. v. FCC*, 79 F.3d 1195, 1202 (D.C. Cir. 1996); *Am. Message Centers v. FCC*, 50 F.3d 35, 39 (D.C. Cir. 1995); *MCI Telecommunications Corp. v. FCC*, 59 F.3d 1407, 1414 (D.C. Cir. 1995); *Capital Network Sys., Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994); *Nat'l Rural Telecom Ass'n v. FCC*, 988 F.2d 174, 184 (D.C. Cir. 1993); *Illinois Bell Tel. Co. v. FCC*, 988 F.2d 1254, 1260 (D.C. Cir. 1993); *Competitive Telecomms. Ass'n v. FCC*, 998 F.2d 1058, 1064 (D.C. Cir. 1993); *MCI Telecomms. Corp. v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990); *MCI Telecomms. Corp. v. FCC*, 842 F.2d 1296, 1303 (D.C. Cir. 1988); *Ad Hoc Telecomms. Users Comm. v. FCC*, 680 F.2d 790, 795 (D.C. Cir. 1982); *Am. Broad. Companies, Inc. v. FCC*, 663 F.2d 133, 138 (D.C. Cir. 1980); *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 336 (D.C. Cir. 1980); *AT&T Co. v. FCC*, 449 F.2d 439, 450 (2d Cir. 1971).

[11] *AT&T Co.*, 299 U.S. at 246-47.

[12] *Cellco P'ship.*, 700 F.3d at 548.

want our world-leading Internet economy to be shaped by engineers, consumers and entrepreneurs, or *lawyers*?

Additionally, not only would a new Title II regime, however "skinny," produce an abundance of lawsuits and uncertainty, but the premise of applying it to begin with is flawed as well. Proponents of regulating the Internet under Title II argue that doing so would prevent "two-sided markets," usage-based pricing and "discrimination"[13] of Internet traffic. In fact, the exact opposite is true. Not only does Title II allow usage-based pricing, that is exactly what it is designed to regulate.[14] Not only does it allow for the "reasonable" discrimination of traffic, it mandates that similarly situated producers of traffic can be charged similar rates if those rates are just or reasonable.[15] Title II would not prevent network operators from charging some content and application – or "edge" – providers to carry their Internet traffic. Indeed, Title II would allow for a "sending party pays" construct that some American edge providers and network operators are battling against *together* in international regulatory arenas.[16] Furthermore, it would

[13] The term "discrimination" is often misused in the net neutrality debate. Discrimination can have many meanings. To a network engineer, discrimination is absolutely necessary and means having the ability to manage Internet Protocol networks. For instance, consumers downloading movies want those video bits to arrive on their screens quickly and without interference from other Internet traffic such as email or voice over Internet protocol (VoIP) communications. Similarly, a caller using VoIP in an emergency wants his/her call to 911 to take priority over Internet traffic carrying a cat video. Another example is Internet traffic carrying heart monitoring data from a patient to his/her doctor. During a medical crisis, the patient will want discrimination, thus allowing life-saving data to reach the doctor as quickly as possible and ahead of other traffic. This is also known as "prioritization," something net neutrality proponents oppose. Treating all Internet traffic "equally," as many net neutrality proponents want, would undermine the beneficial aspects of allowing the freedom to innovate through the ability to discriminate in the engineering context. What should *not* be permitted, and is prohibited under existing antitrust and consumer protection laws, is discrimination that has an anticompetitive effect that harms consumers. Boiling the net neutrality debate down to the bumper sticker of "treat all Internet traffic equally" may have popular appeal, but it is a misleading slogan that will likely have dangerous implications if it is codified as public policy.

[14] 47 U.S.C. §§ 201-202.

[15] *Id.* § 202(a).

[16] *Revisions of the International Telecommunications Regulations – Proposals for High Level Principles to be Introduced in the ITRs*, ETNO, CWG-WCIT12 Contribution 109, at 2 (2012), *available at* http://www.itu.int/md/T09-CWG.WCIT12-C-0109/en.

provide cover and encouragement to the Vladimir Putins of the world who are looking to regulate the Internet globally.

At the consumer level, industry analysts have concluded that new utility-like economic regulation of the Internet would likely "have the perverse effect of raising prices to all users" (hitting low-income users the hardest), and some users would likely see the end of their service entirely.[17]

Finally, a Title II framework would lay a broad-based legal foundation for the Commission eventually to regulate the entire Internet ecosystem – not just network operations, but content, applications and potentially devices. Such is the goal of the influential thought-leader of the movement, the man who coined the term "net neutrality," Columbia law professor, Timothy Wu. He provided refreshingly honest testimony alongside me at a House Judiciary Committee hearing on net neutrality last June.[18] His influence over shaping the arc of net neutrality policies is not merely theoretical – it is real and highly effective. For example, Professor Wu has tremendous influence at the FCC, having authored the first-ever net neutrality merger conditions during the Commission's approval of the AT&T/BellSouth transaction in 2006.[19] In short, the ultimate policy goal of many Title II proponents is comprehensive industrial policy for the entire Internet space.

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[17] Howard Buskirk, *Investors, Analysts Uneasy About FCC Direction on Net Neutrality*, COMM. DAILY, Oct. 2, 2009, at 2; *see also* National Cable & Telecommunications Association Comments at 19 and Verizon and Verizon Wireless Reply Comments at 17–18 to *Preserving the Open Internet*, GN Docket No. 09-191; *Street Talk*, CableFAX, June 14, 2010 ("But while it's business as usual now, capital investment will come down if Title II becomes a reality, said Credit Suisse telecom services dir[ector] Jonathan Chaplin. He said the next place companies would look to capture some of the return is costs, which would mean jobs.").

[18] *See* House Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law, *Net Neutrality: Is Antitrust Law More Effective than Regulation in Protecting Consumers and Innovation*?, 113th Congress, 2nd sess., 2014 (testimony of Timothy Wu), *available at* http://judiciary.house.gov/_cache/files/bcecca84-4169-4a47-a202-5e90c83ae876/wu-testimony.pdf. (noting that state manipulation of the Net would shape "not merely economic policy, not merely competition policy, but also media policy, social policy" and "oversight of the political process").

[19] Spencer E. Ante, *Tim Wu, Freedom Fighter*, BUS. WK., Nov. 8, 2007, *available at* http://www.businessweek.com/stories/2007-11-08/tim-wu-freedom-fighterbusinessweek-business-news-stock-market-and-financial-advice; Robert

Furthermore, turning information services into telecommunications services via a *de novo* classification effort by the FCC would render drawing a principled line between broadband service providers and other entities that combine transmission with information processing or storage, such as the content delivery networks that give us Netflix movies or YouTube videos, impossible. In short, as "tech" and "telecom" companies blend their technologies and business operations, or "converge," to better serve consumers, the differences between them are disappearing. Many such companies have thousands of miles of fiber (embedded with intelligence and content) that connect servers and routers all over the country to deliver a slurry of ones and zeros (which present themselves to consumers as voice, data and video services) as quickly as possible to consumers. Designed in 1934, Title II is incapable of seeing these 21st Century technological distinctions and is likely to draw all such companies under its powerful purview. The Supreme Court has warned that this scenario could develop. It held in its *Brand X* decision in 2005 that "[reclassification] would subject to mandatory common-carrier regulation all information-service providers that use telecommunications as an input to provide information service to the public."[20] Or, as Robert Litan recently explained, "[t]here is a very slippery slope from having designated ISPs as being subject to common carriage regulation to having to include other forms of Internet transmissions as well because they arguably use 'telecommunications services', the legal hook in Title II for its application."[21] That captures nearly any edge provider that owns even the smallest amount of transmission, processing, storage or caching facilities.

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M. McDowell, *This is Why the Government Should Never Control the Internet*, WASH. POST, July 14, 2014, *available at* http://www.washingtonpost.com/posteverything/wp/2014/07/14/this-is-why-the-government-should-never-control-the-internet/.

[20] *Brand X*, 545 U.S. at 994.

[21] *See* Robert E. Litan, *Regulating Internet Access as a Public Utility: A Boomerang on Tech If It Happens*, Economic Studies at Brookings, at 2 (June 2, 2014).

This analysis is neither new nor partisan.[22] In fact, the Clinton-era FCC Chairman, William Kennard, presciently said in 1998:

> Turning specifically to the matter of Internet access, we note that 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.[23]

Just two years later, he reiterated:

> It just doesn't make sense to apply hundred-year-old regulations meant for copper wires and giant switching stations to the IP networks of today. . . . We now know that decisions once made by governments can be made better and faster by consumers, and we know that markets can move faster than laws.[24]

And here's what the Clinton White House had to say about placing legacy regulations on the Internet: "We should not assume . . . that the regulatory frameworks established over the past sixty years for telecommunications, radio and television fit the Internet."[25]

Rather than applying the 80-year old Communications Act to the Internet, if Congress believes that a change is needed to protect consumers, entrepreneurs, innovation and free markets, it should consider new legislation that is narrowly tailored and reflects the market realities of the early 21st Century. Even more importantly, Congress should consider a comprehensive update of our communications laws, and I hope that would be a topic for a future hearing.

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[22] American Internet policy enjoys a rich heritage of bipartisanship. The Clinton-Gore-era flexible "hands-off" approach to Internet governance, and other Internet policy matters, has been supported by both Republicans and Democrats in Congress and the FCC for over two decades. These policies have served not only American consumers and the U.S. economy well, but also have helped spread freedom and prosperity across the globe through the power of the mobile Internet. This year, Congress has an opportunity to recast American Internet policy in a constructive and bipartisan manner worthy of its heritage.

[23] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, ¶ 82 (1998).

[24] Hon. William E. Kennard, Chairman, FCC, Remarks at the Voice Over Net Conference: Internet Telephony—America Is Waiting (Sept. 12, 2000).

[25] The White House, *A Framework for Global Electronic Commerce* (July 1, 1997).

**WIRELESS BROADBAND IS DIFFERENT FROM WIRELINE INTERNET SERVICES AND SHOULD NOT BE SUBJECT TO RIGID RULES.**

The American wireless industry has been a crown jewel of the American economy for over 30 years. In fact, since its inception, the domestic wireless industry has invested more than $430 billion in infrastructure.[26] The White House Office of Science and Technology has noted that "[a]nnual investment in U.S. wireless networks grew more than 40% between 2009 and 2012, from $21 billion to $30 billion."[27]

Analysts' projections estimate that between 2013 and 2017 wireless infrastructure investment will generate as much as $1.2 trillion in economic growth and create (directly and indirectly) up to 1.2 million new jobs.[28] This will result in an estimated $85 to $87 billion of economic growth each year from 2013 through 2017, giving a 2.2 percent boost in GDP by 2017.[29] Furthermore, the use of unlicensed spectrum, like Wi-Fi, generates an estimated $62 billion a year for the U.S. economy.[30]

Wireless carriers are investing in the world's best infrastructure because competition is fierce. According to an FCC report released just last month, as of January 2014, 93.8 percent of the U.S. population had access to at least three mobile broadband providers, and 83.8 percent

[26] CTIA—The Wireless Association, *CTIA's Wireless Industry Summary Report: Year-End 2013 Results* (2014), *available at* http://www.ctia.org/docs/default-source/Facts-Stats/ctia_survey_ye_2013_graphics-final.pdf?sfvrsn=2; John C. Hodulik, *et al.*, *US Wireless 411: Version 5*, UBS, Nov. 25, 2014, at 10.

[27] FCC, *Fact Sheet: Internet Growth and Development* (2014), *available at* https://apps.fcc.gov/edocs_public/ attachmatch /DOC-325653A1.pdf.

[28] Alan Pearce, J. Richard Carlson & Michael Pagano, *Wireless Broadband Infrastructure: A Catalyst for GDP and Job Growth 2013-2017* (2013), *available at* http://www.pcia.com/images/IAE_Infrastructure_and_Economy_ Fall_2013.PDF.

[29] *Id.*

[30] Consumer Electronics Association, *Unlicensed Spectrum and the American Economy: Quantifying the Market Size and Diversity of Unlicensed Devices* (2014), *available at* http://www.ce.org/CorporateSite/media/gla/CEA UnlicensedSpectrumWhitePaper-FINAL-052814.pdf.

lived in areas with coverage by four or more mobile broadband providers.[31] Robust competition is providing a strong check against anti-competitive behavior. Accordingly, the long-standing and bipartisan consensus regarding public policy in the wireless space has been to allow competition to obviate the need for command-and-control regulation and industrial policy. As the statistics reveal, this hands-off approach has produced a constructive explosion of entrepreneurial brilliance which is benefiting consumers. Now is not the time to put our gains at risk by injecting rigid regulations into a thriving competitive market.

Furthermore, America is leading the world in 4G wireless technologies and services, or LTE. U.S. consumers account for more than 37 percent of the world's LTE subscribers even though America is home to less than five percent of the world's population.[32] By contrast, Western Europe, with a population greater than the U.S., accounts for just 13 percent of the world's LTE subscribers.[33]

Dominance in 4G penetration and adoption is giving America a decisive advantage in the highly competitive global marketplace. We didn't get here through government mandates or industrial policy, however. Investment in new wireless technologies, unfettered by unnecessary government regulation, is producing faster mobile data connection speeds. Specifically, average mobile connection speeds in the U.S. are 30 percent higher than in Western Europe.[34] Best of all, that gap is expected to grow. As the "Internet of Everything" ("IoE") explodes to connect billions more devices to the Net – through mobile technologies, from cars to health monitoring

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[31] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Mobile Conditions with Respect to Commercial Mobile Services*, Seventeenth Report, WT Docket No. 13-135, Table III.A.v (rel. Dec. 18, 2014).

[32] Ovum's Informa Telecoms & Media World Cellular Information Service (WCIS+) (as of Sept. 2014).

[33] 4G Americas, *Global LTE Connections* (as of Sept. 2014), *available at* http://www.4gamericas.org/index.cfm?fuseaction=page&pageid=2055.

[34] *See* Cisco *VNI Forecast Highlights*, *available at* http://www.cisco.com/web/solutions/sp/vni/vni_forecast_highlights/index.html.

equipment to inventory control technologies – it will transform the global economy and America will have an advantage over our economic rivals.[35]

New phone-monopoly-style regulations applied to wireless broadband by the FCC, however, could inhibit investment and innovation, and America could lose her competitive advantage in the mobile and IoE space.

In view of the unique characteristics of wireless broadband, it was the bipartisan and unanimous consensus of the FCC in its 2010 *Open Internet Order* that the heart of new net neutrality rules not be applied to wireless broadband services.[36] The primary reason for treating wireless and wireline differently is that mobile broadband technologies use shared networks. Wireless consumers may not realize it, but they are sharing bandwidth with their neighbors. The sharing of wireless bandwidth creates a host of technical and operational challenges associated with the availability of capacity, the lack of predictability about consumer demand and the scarcity of spectrum. As such, the intricate art of network management of wireless networks is far different from that of fiber or coaxial-based networks.[37] Applying rigid, one-size-fits-all regulations to mobile broadband would tie the hands of engineers trying to maximize network efficiency for consumers as they are forced to live under new government supervision. Innovation, investment and consumer well-being would be at risk as new rules would create

[35] *See* Deloitte, How policy actions could enhance or imperil America's mobile broadband competitiveness, Sept. 2014, at 17, *available at* http://www2.deloitte.com/content/dam/Deloitte/us/Documents/technology-media-telecommunications/us-tmt-mobile-index-09262014.pdf ("Bullish industry forecasts include an estimate of 26 billion installed Internet of things units by 2020, impacting the global supply chain, and a prediction of 24 billion connected devices globally by 2016, resulting in a $1.2 trillion impact to North American economies from revenues, cost reductions, or service improvements.").

[36] *Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, ¶¶ 80-92 (2010).

[37] For instance, according to CTIA—The Wireless Association, "a single fiber strand can carry 1,000 times more bits per second than a 10 GHz radio channel." Reply Comments of CTIA—The Wireless Association, GN Docket Nos. 14-28, 10-127, at 3 (filed Sept. 15, 2014). Wireless technologies are, indeed, different and highly complex, and should not be burdened by new "one-size-fits-all" regulation.

uncertainty and spark a counterproductive regulation/litigation cycle.[38] Any new legislation should take into account the unique characteristics of wireless broadband.

Furthermore, as a matter of law, Congress would have to act to create a new framework for wireless broadband. The FCC cannot accomplish this on its own. In Title III, Congress wisely prohibited the FCC from regulating wireless broadband services as common carriage under Title II.[39] It is a misconception that Section 332 provides the FCC with the power to regulate wireless broadband under Title II, as Chairman Wheeler stated at the Consumer Electronics Show two weeks ago. In fact, the U.S. Court of Appeals for the D.C. Circuit has held recently that wireless broadband providers "are statutorily immune, perhaps twice over, from treatment as common carriers."[40]

In Section 332, Congress codified an important distinction between a "commercial" mobile service and "private" mobile service.[41] A commercial mobile service "interconnects" with the public switched telephone network ("PTSN").[42] A private mobile service, by contrast, is not interconnected with the PSTN.[43] By definition, wireless broadband does not connect to the PSTN because it is an Internet access service.

In 1993, Congress enacted legislation mandating that the FCC treat these two services differently.[44] For commercial mobile services, or traditional voice cellular services connected to the PSTN, Congress instructed the FCC to impose narrowly defined common carrier

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[38] *See* Robert Litan and Hal Singer, *The Best Path Forward on Net Neutrality*, Progressive Policy Institute, at 8 (Sept. 4, 2014) (noting that "a heavy-handed Title II approach could risk substantial core investment without generating any offsetting incremental investment at the edge").

[39] 47 U.S.C. § 332(c)(2).

[40] *Cellco P'ship*, 700 F.3d at 538.

[41] 47 U.S.C. § 332(d).

[42] *Id.* § 332(d)(1); *see also* 47 C.F.R. § 20.3.

[43] 47 U.S.C. § 332(d)(3).

[44] Pub. L. No. 103-66, 107 Stat. 312 (1993).

regulations.[45] For private mobile services, including what are now mobile broadband services, however, Congress declared that "[a] person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose."[46] In short, to be "treated as a common carrier" means the FCC cannot impose Title II-style public utility regulation on a wireless broadband service provider.[47]

Simply put, Congress has already spoken: Section 332 clearly bars the FCC from regulating wireless broadband under Title II.[48] Attempts to circumvent Congress's direct mandate will be overturned in court.

## CONCLUSION

The Internet ecosphere is blossoming beautifully, resulting in the most positive and constructive transformation of the human condition in history. If Congress chooses to act, it should do so in a tailored manner. In the meantime, while the directly elected representatives of the American people work together in good faith on these issues, the FCC should delay further action.

Thank you for the opportunity to testify and I look forward to your questions.

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[45] *Id.* § 332(c)(1).

[46] *Id.* § 332(c)(2).

[47] *Verizon*, 740 F.3d at 652; 47 U.S.C. §§ 201, 202. Even though wireless carriers will often provide their customers with both commercial and private mobile services under a single contract, the FCC may only treat wireless carriers as common carriers under Title II when they are providing traditional mobile voice services. *See Cellco*, 700 F.3d at 538.

[48] 47 U.S.C. § 332(c)(2).