Written Questions Submitted by Hon. John Thune to Hon. Ajit Pai

Question 1. Following the reclassification of broadband Internet access service as a Title II public utility, Chairman Wheeler indicated that the FCC will propose new privacy regulations. The Federal Trade Commission (FTC) already has extensive experience in protecting consumer privacy, and consumers and business already have experience in applying the FTC's privacy rules and precedents; the Commission has virtually no such experience beyond the very narrow confines of rules implementing Sec. 222. Why would the Commission create a new, likely inconsistent set of rules rather than adopting the FTC's privacy protections? Given that the Commission's rules will only apply to BIAS providers, isn't there a significant likelihood that functionally identical activities on a smartphone will be governed by completely different rules based upon who is providing the service?

Answer: I agree that adopting rules inconsistent with the FTC's rules would distort the marketplace to favor some service providers over others. Indeed, I agree with Chairman Wheeler's testimony to the House Energy and Commerce Committee that "there should be a uniform expectation of privacy" across the online ecosystem. That's why many are perplexed that the FCC seems reluctant to adopt the same privacy protections for ISPs that the FTC has long applied to edge providers.

Question 2. I understand that you are close to finalizing action on an order that would address the standalone broadband issue that many in Congress have written to you about over the past several years and also adopt some new limits and other measures related to universal service support for rate of return providers. Do you commit to work quickly and collaboratively with this committee and with affected stakeholders to the extent any adverse or unintended consequences arise out of the reforms?

Answer: Yes. And to the extent that our efforts are intended to fulfill our commitment to this Committee, I believe the FCC should make the reforms public and allow you and the American public to provide feedback *before* the Commission votes.

Question 3. Ensuring that rural and urban consumers have access to reasonably comparable services at reasonably comparable rates is a fundamental statutory principle of universal service. Are you confident that the standalone broadband solution you are poised to adopt will do that – specifically, will it allow rural consumers to get standalone broadband at rates reasonably comparable to their urban counterparts? If not, what more do you think the FCC will need do to ensure such comparability?

Answer: I am still reviewing the draft order to determine whether it meets our universal service mandate. In the meantime, I have asked Chairman Wheeler to release it to the public so that all stakeholders can see the details and let their voices be heard before a vote. Commissioner O'Rielly has supported my request, but Chairman Wheeler has not yet responded to it.

Question 4. I have heard concerns that the methodology used in the 2014 order to determine the local rate floor for voice service has led to rates in some rural areas, including parts of South

Dakota, that are not reasonably comparable to those services provided in urban areas. Given this concern, when do you plan to act on the petition for reconsideration filed by several rural associations regarding the rate floor methodology? Do any other Commissioners have thoughts regarding this matter?

Answer: I am not surprised that the rate floor will lead to unreasonable rates for your constituents—the whole purpose of the rule is to increase rates in rural America without saving the Universal Service Fund a single dime. That's why I do not support the rural rate floor and have repeatedly called for its repeal.

Question 5. Last July, the FCC released an omnibus declaratory ruling on the Telephone Consumer Protection Act (TCPA). TCPA litigation has increased dramatically in the last decade. What considerations did the Commission give to the impact its ruling would have on businesses, both large and small, that need to reach their customers for legitimate business purposes?

Answer: The Commission minimized, if not ignored altogether, the *Order*'s impact on legitimate businesses. That's why I said in my dissent that the *Order* would make abuse of the TCPA much, much easier and that the primary beneficiaries would be trial lawyers, not the American public.

The past is likely to be prologue. In my dissent, for instance, I highlighted the case of Rubio's, a West Coast restaurateur. Rubio's sends its quality-assurance team text messages about food safety issues, such as possible foodborne illnesses, to better ensure the health and safety of Rubio's customers. When one Rubio's employee lost his phone, his wireless carrier reassigned his number to someone else. Unaware of the reassignment, Rubio's kept sending texts to what it thought was an employee's phone number. The new subscriber never asked Rubio's to stop texting him—at least not until he sued Rubio's in court for nearly half a million dollars. The Commission's recent TCPA action will release the hounds of the trial bar upon many more small businesses in similar fashion.

Question 6. Many small businesses seek to improve their efficiency and customer relationships by providing information to their customers through the use of modern dialing technologies. The FCC's recent interpretation of the term "autodialer" in the TCPA declaratory ruling, however, could sweep in any number of modern dialing technologies. Other than using a rotary phone, what other technologies can small businesses feel comfortable using without exposing themselves to TCPA litigation risk?

Answer: If I were counsel to a small business, I would advise it to use only a rotary phone given the business-wrecking expense of a TCPA class-action suit. That's because the FCC's definition of "autodialer" appears to sweep in every other dialing technology currently in existence.

Question 7. By establishing liability after a mere one-call exception, the Commission's ruling creates a perverse incentive for incorrectly-called parties to allow or even encourage incorrect calls to continue, rather than notify the calling party of the error. These continuing incorrect

calls thus become potential violations and the basis for monetary penalties sought through litigation. What will you do to repair this perverse incentive?

Answer: As I stated in my dissent, the *Order*'s strict liability approach leads to perverse incentives. Most significantly, it creates a trap for law-abiding companies by giving litigious individuals a reason not to inform callers about a wrong number. This will certainly help trial lawyers update their business model for the digital age. This isn't mere hypothesis, as shown by the case of Rubio's, discussed above.

I hope that the FCC or the courts will soon reject this reckless interpretation and replace it with the "expected-recipient" approach to incorrectly-called parties. Under this approach, TCPA liability would not apply if the calling party dialed a number reasonably expecting to reach Person A, even if Person B actually answered the phone.

Question 8. Has the Commission considered providing a safe harbor for a calling party that reasonably relies on available customer phone number records to verify the accuracy of a customer's phone number?

Answer: The Commission explicitly rejected that approach by adopting a strict liability standard. In my view, a safe harbor would be consistent with the Act. The Commission has long employed safe harbors for reasonable private conduct in other contexts, and there is no reason why it couldn't have done so here.

Question 9. The pay TV set-top box NPRM proposes to expand the scope of the term "navigation device" to include "software or hardware performing the functions traditionally performed in hardware navigation devices." On what theory does the Commission base this interpretation and expansion of the statutory term's scope to include software? Does software that is not integral to the operation of a navigation device fall within the scope of Section 629?

Answer: I do not believe that such software falls within the scope of Section 629. I did not vote for the NPRM that proposed to expand the scope of the rules implementing Section 629 to include software, and I will leave it to those who supported the NPRM to explain their reasoning.

Question 10. How does the NPRM propose or contemplate preventing third party devices or applications from adding unapproved or additional advertising alongside MVPD service content? How does the NPRM propose to protect and secure interactive MVPD programming and services when accessed through third party devices or applications? How does the NPRM propose to enforce such protection and security measures?

Answer: The NPRM does not propose any rules to prohibit third party devices or applications from adding unapproved or additional advertising alongside MVPD service content. Neither does the NPRM propose any rules to prohibit third party devices or applications from removing the advertising provided by programmers and replacing it with their own advertising. In its own words, the NPRM proposes to leave "the treatment of advertising to marketplace forces." This is one of the principal reasons why I opposed the NPRM. I will leave it to those who supported the NPRM to explain how it proposes to

protect and secure interactive MVPD programming and enforce such protection and security measures.

Written Questions Submitted by Hon. Ron Johnson to Hon. Ajit Pai

Question 1. At the FCC Oversight hearing I asked Chairman Wheeler why the FCC decided not to release a public notice requesting more comment on places where the Chairman's office believed the record to be thin. Chairman Wheeler responded that he hit pause for the purpose of "enriching the record" because he knew "the Big Dogs are going to sue" and wanted to make sure "all the i's were dotted and the t's crossed." Because no public notice was ever issued, it appears that the FCC chose expediency over process. What effect does that have on the overall Open Internet Order?

Answer: In rubber-stamping President Obama's plan to regulate the Internet, the FCC violated the procedural requirements of the Administrative Procedure Act (APA). The FCC never proposed the rules being adopted, violating the APA's notice-and-comment requirement. In the *Notice*, the FCC proposed rules exclusively under section 706 of the Telecommunications Act. Every single proposal and every single tentative conclusion in the *Notice* was tailored to avoid reclassifying broadband as a Title II service. Yet that's exactly what the FCC did in the *Title II Order*. No one could have anticipated the number or nature of the hoops the *Order* would jump through to reclassify broadband. Nor could anyone have anticipated the *Order*'s 49 separate forbearance decisions; its decision to subject interconnection to Title II as a "component" of broadband Internet access service; its decision to amend agency rules regarding mobile broadband; or its adoption of an omnivorous "Internet conduct" standard, the scope of which still remains uncertain.

In short, I agree that the agency chose political expediency over a public process, and I believe that leaves the *Title II Order* vulnerable to judicial review.

Question 2. Please provide examples of how investment has been hindered based on the FCC's Open Internet Order.

Answer: Last year, many small ISPs declared under penalty of perjury that they are cutting back on investments because of the FCC's decision. Here are a few examples.

- **KWISP Internet serves 475 customers in rural northern Illinois. As a result of the regulatory uncertainty and costs created by the FCC's decision, KWISP plans to delay network upgrades that would have upgraded customers from 3 Mbps to 20 Mbps service, new tower construction that would have brought service to unserved areas, and capacity upgrades that would reduce congestion for existing customers—not to mention the jobs needed to make all of that happen. KWISP worries that even a frivolous lawsuit brought under the Order could force ownership to "close the business."**
- **Wisper ISP Inc. is an 11-year-old ISP that serves 8,000 customers around St. Louis, Missouri. Wisper estimates that compliance costs will constitute 10% of its operating revenue. As a result, it has already cut investment, resulting in "slower broadband speeds, less dense coverage, and absence of expansion into new areas." For example, prior to the FCC's decision, Wisper was planning to triple the number of new base stations it would deploy each month in order to provide broadband to**

customers in new areas. But as a result of the Order, Wisper has put those plans on hold.

- **SCS Broadband serves 800 customers in rural Virginia. SCS Broadband has already stopped investing in new rural areas because of the FCC's decision, and it won't resume until it can "determine if the additional cost in legal fees warrant such investments." And investors have already told SCS Broadband that "projects that were viable investments under the regime that existed before the Order will no longer provide the necessary returns to justify the investment."**
- **Joink LLC serves 2,500 customers in and around Terre Haute, Indiana. Although Joink was exploring a fiber-to-the-home project in its community, newfound regulatory uncertainty "will cause us to slow this investment, or not make it at all"—and so, consumers "will be left with slower broadband speeds." Joink also worries that "those with deeper pockets can use broadly applied subjective standards to drag entities such as Joink into litigation or to force us to forego profitable business practices that can benefit our customers to avoid potentially crippling litigation expenses."**
- **Aristotle Inc. serves nearly 800 customers in and around Little Rock, Arkansas. Aristotle has been committed to serving the unserved, and 60% of its customers wouldn't have any broadband option at all but for Aristotle's past investments. Because of the regulatory uncertainty created by the Order, Aristotle has dialed back its plans to "triple" its customer base and "expand our service into unserved areas of rural Arkansas." At this time, Aristotle plans to target just "three smaller communities that abut our existing network."**
- **Washington Broadband, Inc. serves 1,400 customers in Yakima County, Washington. Washington Broadband "has aggressively constructed new towers that cover small areas based on a return on investment model of light density return," but the Order has forced Washington Broadband to give up that business model. Instead, it "has decided to scale back expansion to new, unserved or underserved areas and focus on more urban/suburban areas."**

I have also attached the sworn declarations that these six companies and two other small companies filed with the FCC on the impact of the *Title II Order*.

Question 3. This Commission seems to have difficulty identifying competition in the wireless market, as it has steadfastly refused to make a finding of effective competition in recent Wireless Competition Reports. For instance, in the latest Wireless Competition Report, released on December 23, 2015 without a vote by the full Commission, Chairman Wheeler's report states: "this [Report] does not reach an overall conclusion or formal finding regarding whether or not the CMRS marketplace was effectively competitive, but rather it provides an analysis and description of the CMRS industry's competitive metrics and trends. ... This Report instead focuses on presenting the best data available on various aspects of competition throughout the mobile wireless ecosystem and highlights several key trends."

At the same time, the report states that more than 90 percent of Americans have access to four or more wireless service providers. And, more than 82 percent of Americans have access to four or

more providers of advanced LTE service. In your view, is the Commission following Congress's directive to evaluate the competitiveness of the wireless market? Why does Chairman Wheeler's report not reach any conclusion in spite of the broad array of choices available to consumers?

Answer: No, the Commission is not following Congress's directive. The Commsision should be making fact-based decisions that reflect marketplace realities. But doing so consistently has not been the FCC's hallmark in recent years. The FCC's Wireless Competition Report is a salient example. Considering the facts you accurately recount above, the conclusion was obvious and the decision to make a decision shouldn't have been hard.

As I stated when the agency released the latest Report, this FCC will never find that there is effective competition in the wireless market, regardless of what the facts show. That's because doing so would undermine the agency's goal of expanding its authority to manipulate the wireless market—a goal it cannot accomplish if it deems that market healthy.

Written Question Submitted by Hon. Ted Cruz to Hon. Ajit Pai

Question 1. In the Open Internet Order, the Federal Communications Commission (FCC) revised the definition of "public switched network" to mean "the network that . . . use[s] the North American Numbering Plan, *or public IP addresses*, in connection with the provision of switched services" (See para. 391 (emphasis added)). Although the FCC disclaimed any intent to "assert" jurisdiction over the assignment or management of IP addresses by the Internet Numbers Registry System (see *id.* at note 1116), the FCC's decision to equate telephone numbers with IP addresses nonetheless gives the FCC statutory jurisdiction over IP addresses as a matter of law. Over 20 years ago the FCC concluded that Section 201 of the Communications Act gave it plenary jurisdiction over telephone numbers, because "telephone numbers are an indispensable part" of the duties that section 201 imposes on common carriers (See Administration of the North American Numbering Plan, Notice of Proposed Rulemaking, FCC 94-79, ¶ 8 (1994)). IP addresses are likewise an indispensable part of the duties the FCC imposed on ISPs under section 201, including the duty to connect to "all or substantially all Internet endpoints".

How can the FCC uphold the public interest requirements in section 201 of the Act if it refuses to assert its statutory authority over an indispensable part of the public switched network?

Answer: It cannot. I do not believe that Congress has given the FCC any role with respect to regulating the Internet—instead, Congress told us to leave the Internet "unfettered by Federal or State regulation." Communications Act § 230(b)(2). And so under my view, the FCC has no statutory authority over IP addresses.

If the FCC believes regulation of IP numbers used to connect end points on the public switched telephone network is unnecessary, why hasn't it forborne from the regulation of telephone numbers?

Answer: As I stated in my dissent to the *Title II Order*, the FCC's approach to forbearance in this area has been scattershot and unprecedented. As such, I do not know why the agency did not forbear in this particular instance.

Written Question Submitted by Hon. Dean Heller to Hon. Ajit Pai

Question 1. For years, I have believed that the way in which rules are processed at the Commission lacks transparency and is detrimental to the American public. My FCC Process Reform Act would address these transparency and accountability issues for the sake of consumers and the industries supporting innovation and our economy.

For example, the public has no idea the specific language of the rules the Commission is voting on until after they are passed. We saw that with the net neutrality rules that were pushed through this time last year, and we saw it a few weeks ago when the FCC voted on the proposal related to set-top boxes.

In fact, Chairman Wheeler said during that meeting on set-top boxes: "There have been lots of wild assertions about this proposal before anybody saw it." The problem is that the public doesn't know what to expect from the rule—there is no certainty for those on the outside.

Do you believe the public has a right to see the specific language of a rule before it is voted on by the Commission?

Answer: Yes. Both as a matter of law and good government, the FCC should not adopt regulations before allowing the public to see them.

Question 2. As someone committed to protecting Americans' and Nevadans' privacy, especially related to personally identifiable information (PII), I have a questions regarding the recent set-top box Notice of Proposed Rulemaking.

Currently, pay-TV companies must follow strong privacy protections to ensure consumers' personal information is not collected, utilized, or shared for non-service related purposes. How does this NPRM contemplate applying and enforcing these same privacy to any new suppliers entering the set-top box market? Does the FCC have the legal authority to enforce Title 6 privacy standards on third parties?

Answer: I do not believe that the FCC has the legal authority to enforce Title VI privacy standards directly on third parties. To get around this problem, the NPRM attempts to do so indirectly. Specifically, it proposes to prohibit MVPDs from providing services to any navigation device unless the developer of that device certifies that it meets the privacy requirements set forth in Section 631 of the Act. However, this raises an obvious dilemma. What happens if a navigation device developer violates such privacy requirements after providing the certification contemplated by the NPRM? Who would have the legal authority to take enforcement action against that developer? What would be the remedy? I find it troubling that the answers to these important questions are not contained anywhere in the NPRM.