Before the
Federal Communications Commission
Washington, D.C. 20554

July 17, 2017

In the Matter of	)	
	)	
Restoring Internet Freedom	)	WC Docket No. 17-108
	)	
	)	

Comments of Ken Cuccinelli II

Director and General Counsel

FreedomWorks Foundation

FreedomWorks Foundation is a 501(c)(3) nonprofit and educational foundation dedicated to building, educating, and mobilizing the largest network of activists advocating the principles of smaller government, lower taxes, free markets, personal liberty, and rule of law. In doing so, FreedomWorks Foundation acts as a "service center" for the millions of citizen-leaders who make a difference in the fight for lower taxes, less government, and more freedom.

One of the core projects of FreedomWorks Foundation is the Regulatory Action Center. The Regulatory Action Center is dedicated to educating Americans about the impact of government regulation on economic prosperity and individual liberty. FreedomWorks Foundation is committed to lowering the barrier between millions of FreedomWorks citizen activists and the rule-making process of government bureaus to which they are entitled to contribute.

As Director and General Counsel of FreedomWorks Foundation's Regulatory Action Center, I appreciate the opportunity to offer comment to FCC in strong support of the proposed Restoring Internet Freedom rule.

Background

During my tenure as Attorney General of the Commonwealth of Virginia, I argued that FCC could not regulate Internet service providers (ISPs) as common carriers without violating the expressed intent of Congress. In an Amicus Curiae brief to the United States Court of Appeals for the District of Columbia Circuit regarding *Verizon v. FCC*, I argued on behalf of Virginia, along with the Attorneys General of Georgia, Michigan, Oklahoma, South Carolina, and West Virginia, the following:

> "Virginia and the other Amici States have an interest in preserving the actual statutory scheme established by Congress because of their policy in favor of property rights and free markets and of preserving the residual regulatory power retained by the States. The Congressional scheme, properly construed, leaves room for those closest and most accountable to regulate in the interests of their constituencies and reserves open space for individual innovation and free exchange unchecked by the heavy hand of distant, unaccountable bureaucracies. Because the FCC's interpretation of Congress' delegation, where it does not actually

violate its express terms, is untethered to the statutory text and knows no logical limit, it should be rejected."[1]

The Court ultimately agreed in *Verizon* that FCC improperly imposed stringent common carrier regulations on ISPs, prohibited under Title I of the Communications Act of 1934. In 1996 the bipartisan Telecommunications Act was signed into law and amended the Communications Act to create a distinction between information services, prohibited from common carrier regulations under Title I, and telecommunication services, subject to common carrier regulations under Title II.

Congress made clear it considered the Internet to be a Title I information service and therefore not subject to common carrier regulations. The law explicitly states that "Internet and other interactive computer services have flourished… with a minimum of government regulation."[2] This clearly defines the Internet as an interactive computer service and further demonstrates that Congress supported lighter regulation of ISPs.

The law goes on to define interactive computer services as "any service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the

---

[1] Brief of the Commonwealth of Virginia and the States of Georgia, Michigan, Oklahoma, South Carolina, and West Virginia as Amicus Curiae In Support of Reversal, *Verizon v. Federal Communications Commissions,* United States Court of Appeals for the District of Columbia, July 23, 2012. https://apps.fcc.gov/edocs_public/attachmatch/DOC-317117A1.pdf

[2] 47 U.S.C. § 230(a)(4).

Internet…."[3] Transitively and explicitly, Congress intended for ISPs to be regulated as an information service under Title I and not under Title II common carrier rules.

FCC subsequently affirmed the Title I information service designation of ISPs in no fewer than five instances between 1996 and 2014.[4] The Supreme Court even weighed in, upholding Title I classification of cable ISPs in 2005.[5]

However, in 2015, under direct pressure from President Obama, FCC finalized the Protecting and Promoting the Open Internet rule, which reclassified ISPs as telecommunications services and thus subject to common carrier regulations. Unfortunately, in 2016 the DC Circuit Court upheld this reclassification in a 2-1 decision in *United States Telecom Association v. FCC.*[6]

As mentioned, my prior work on this issue focused on why FCC could not legally regulate ISPs as common carriers. At this point in time, given the standing case law from *United States Telecom* (for the time being) and the nature of FCC's request for comment on the proposed Restoring Internet Freedom rule, my comments will focus on why FCC *should* not regulate ISPs as common carriers and why the Commission should proceed ahead in finalizing this rule.

---

[3] 47 U.S.C. § 230(f)(2).

[4] Federal Communications Commission, Notice of Proposed Rulemaking, Restoring Internet Freedom, WC Docket No. 17-108, May 18, 2017. https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-60A1.pdf

[5] *Ibid.*

[6] Decision of the United States Court of Appeals for the District of Columbia Circuit, *United States Telecom Association, Et Al., v. Federal Communications Commission and the United States of America*, June 14, 2016. https://www.cadc.uscourts.gov/internet/opinions.nsf/3F95E49183E6F8AF85257FD200505A3A/$file/15-1063-1619173.pdf

In short, the 2015 Open Internet rule creates both constitutional and economic problems. It is an example of a regulation that is both subversive to limited government and separation of powers as well as economically backwards.

Checks and Balances

The 2015 Open Internet order reclassifying ISPs under Title II is antithetical to America's constitutional system, violating the separation of powers between the branches of government.

As delineated above, Congress explicitly intended for ISPs to be regulated under Title I, not Title II. With legislative power exclusively reserved to Congress under the Constitution, serious concerns are raised when an agency issues a regulation in such stark contrast with the intent of legal authority behind said regulation. The 2015 Open Internet order is a blatant example of such dissidence.

The 2015 order is also problematic because of the precedent it sets regarding the relationship between independent regulatory agencies and the President. While technically part of the executive branch, independent regulatory agencies such as FCC are intended by Congress to be relatively free of political pressure from the White House.[7] Yet, the 2015 order came just three months after President Obama put direct pressure on FCC to reclassify ISPs, reversing nearly two decades of FCC precedent practically overnight.[8] Even if some FCC commissioners

---

[7] Cole, Jared P. and Daniel T. Shedd, "Administrative Law Primer: Statutory Definitions of 'Agency' and Characteristics of Agency Independence," Congressional Research Service, May 22, 2014. https://fas.org/sgp/crs/misc/R43562.pdf

[8] Restoring Internet Freedom, WC Docket No. 17-108

are in agreement with the end-policy, it should give all commissioners pause what message is being sent to future administrations about the true "independence" of independent regulatory agencies.

Innovation, Property Rights, and Competitive Free Markets

While the main contention in *Verizon* was FCC did not have the legal authority to regulate ISPs as common carriers under Title I, our Amicus Curiae brief made specific mention of the threat heavy-handed regulation poses to innovation, property rights, and free markets. This is because at the core of why government could not legally and should not practically regulate ISPs as common carriers is the fact government simply cannot manage or plan industries and markets as efficiently as the spontaneous order of the free market.

In the 2015 Open Internet order, FCC granted itself open-ended authority to regulate prices, plans, and other practices of ISPs—as such is the nature of common carrier regulation. In doing so, FCC made a fatal conceit, an economics concept first postulated by Adam Smith and expanded by F.A. Hayek. Hayek explains the fatal conceit in his book of the same title:

> "The main point of my argument is, then, that the conflict between, on one hand, advocates of the spontaneous extended human order created by a competitive market, and on the other hand those who demand a deliberate arrangement of human interaction by central authority based on collective command over available resources is

due to a factual error by the latter about how knowledge of these resources is and can be generated and utilised[sic]."[9]

In short, no one individual or group could possibly collect and decipher enough knowledge to create more efficient economic outcomes than the countless interactions in a free market. FCC, in its 2015 order, supposes it has the ability to more effectively regulate the practices, prices, and planning of ISPs than market forces exerted by consumers. Not only will this undoubtedly lead to suboptimal service and access for consumers, should FCC exercise this authority to a significant extent, but the mere prospect of such aggressive regulation has already thwarted billions in broadband infrastructure deployment.

A study by the Phoenix Center for Advanced Legal & Economic Public Policy Studies, published in May of this year, found that since FCC first proposed reclassification in 2010, there has been a 25 percent decrease in telecommunications investment versus projections.[10] That is equal to $150-$200 billion in forgone investment.

This drop in investment is related to property rights concerns raised by classifying ISPs as common carriers. Private companies have little incentive to build out infrastructure that they may not be able to control or if they are barred from charging prices that will allow them to recoup costs. Companies may still technically own the broadband infrastructure they've deployed, but ownership is effectively meaningless absent usage and control rights as well.

---

[9] Hayek, F.A., "The Fatal Conceit: The Errors of Socialism," Routledge Publishing, 1988.

[10] Ford, George S., "Net Neutrality, Reclassification and Investment: A Further Analysis," Phoenix Center for Advanced Legal & Economic Public Policy Studies, May 16, 2017. http://www.phoenix-center.org/perspectives/Perspective17-03Final.pdf

This not only deters extant ISPs from deploying additional infrastructure, it also severely reduces the incentive for new market entrants. This stifles innovation and competition, with regulation creating stagnation in the market, ultimately harming consumer welfare.

FCC should seek to ease regulation to foster greater competition between ISPs, not lock the Internet in today's status quo. Advocates of Title II regulation claim that they seek to preserve the Internet as it exists today, yet such a mentality just 20 years ago would have left trillions of dollars in wealth and job creating ideas and companies on the table. Americans, and indeed the world, would still be stuck waiting for a successful dial-up connection had Title II treatment been applied to ISPs in 1996. The fact is that the Internet grew and flourished into the economic engine we know today under Title I regulatory freedom, not through central-planning at FCC.

No market is perfect and there is certainly room for improvement in the ISP sector. However, excessive regulation paralyzes progress. We can ill-afford to look at the Internet through the lens of a Luddite. FCC should seek to facilitate greater competition between ISPs, not erect regulatory constraints which will ultimately only shut out new firms, practices, and technologies.

Conclusion

The 2015 Open Internet order is a particularly impactful example of regulation-gone-awry. FCC abandoned 20 years of successful policy and violated the Intent of Congress by caving to White House pressure, despite its independent status. Further, it did so in pursuit of rules that will ultimately backfire in the pursuit of a better Internet experience for American consumers—already deterring billions in critical ISP investment. For these reasons, I

enthusiastically support this FCC's proposed Restoring Internet Freedom rule to end Title II classification of ISPs.

Respectfully submitted,

Ken Cuccinelli II

Director and General Counsel
FreedomWorks Foundation
400 N Capitol Street NW, Suite 765
Washington, DC, 20001