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

July 17, 2017

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

FreedomWorks Foundation is a 501(c)(3) nonprofit and educational foundation with more than 5 million members and supporters nationwide. Its mission is to educate citizens on, and to promote the adoption of, free-market policies, which it believes inure to the benefit of consumers and citizens generally. FreedomWorks Foundation is actively involved in a number of regulatory issues and has been particularly interested in technological advances and changes in the marketplace that bolster competition and consumer choice. We take a strong interest in the Federal Communications Commission's (FCC's) Notice of Proposed Rulemaking on "Restoring Internet Freedom," given the potential implications for competition and innovation in the technology sector. We believe that consumers are best served by a competitive, dynamic telecommunications market and the thrust of the Commission's efforts should focus on fostering competition to increase consumer welfare. We do not believe that public utility regulation under Title II of the Communications Act furthers these goals, so we support the Commission's actions to end public utility regulation of the internet.

FreedomWorks Foundation believes that maximizing consumer welfare is the principal criterion to be considered when evaluating market activity and organizational structures. This is a fundamental assumption in mainstream economic analysis, and our comments focus on the importance of ensuring a competitive market and avoiding unnecessary regulatory barriers in one of the most fast-paced sectors of the economy. With respect to this proceeding, FreedomWorks Foundation recommends that the Federal Communications Commission abandon Title II public utility regulation and return to the light-touch regulatory regime that provided a framework for exponential growth of the internet and related technologies. Further, FreedomWorks Foundation recommends the FCC conduct a thorough cost-benefit analysis that evaluates the impact of Title II regulation relative to a light-touch regulatory regime.

The pace of adaptation to the new technology is indicative of the value it holds for consumers. Personal computers provided consumers the initial boost in information technology. According to the Department of Commerce, 24 percent of households owned a computer in 1994; by 2013, that figure was 72 percent.[1] The growth in Internet use has been even more striking, with growth rates of 20 percent a year since 1998. In 1998, 33 percent of the nation used the Internet; by 2015 that figure was 75 percent—227 million users.[2] Importantly, households with Internet access have grown at similar rates, with the

[1] National Telecommunications and Information Administration and Economics and Statistics Administration, U.S. Department of Commerce, *Digital Nation Explorer,* available at https://www.ntia.doc.gov/data/digital-nation-data-explorer#sel=computerAtHome&disp=map

[2] *Ibid*.

total percentage of households with Internet access increasing from 22 percent in 1998 to 68 percent in 2015.[3]

It is important to note that this explosive growth all occurred within a framework of light-touch regulation. Since first commercialized in 1997 the Clinton administration and every subsequent administration until the Obama administration recognized the need to avoid excessive regulation of the Internet. President Clinton's Framework for Global Electronic Commerce noted, "Where governmental involvement is needed, its aim should be to support and enforce a predictable, minimalist, consistent and simple legal environment for commerce."[4] Title II is a sharp departure from this policy framework that establishes a vast new regulatory regime based the concept of public utility regulation first created to regulate telephone monopolies. The new Open Internet Order signed by previous FCC Chairman Wheeler injected a great degree of uncertainty and expanded authority for federal oversight of internet network management.

Title II, the Open Internet Order, and Competition

The legacy of rate regulation and natural monopolies is a poor reference point for future policy and Title II public utility regulation is ill-suited for today's internet. Old notions of regulated utilities are already impeding competition and deployment of new technologies. Returning to a regulatory framework that relies on theories of public utility regulation, where monopolists are allowed to operate under some form of regulation with federal regulatory oversight does not serve the public interest.

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[3] *Ibid.*

[4] President Clinton, "Electric Commerce" Memorandum, available at: https://fas.org/irp/offdocs/pdd-nec-ec.htm

The historical record of industries regulated in this manner shows net neutrality advocates are defending a general policy framework that has only served to institutionalize the perceived market failures they seek to combat. Several prominent economic studies arrived at the same conclusion, which is deregulation of industries previously regulated under common carrier or public utility regulations benefited consumers on multiple levels:

> "Consumers have benefited greatly and the overall efficiency of the deregulated industries has improved greatly as well. Firm in these industries have reduced costs, lowered their prices, introduced new services and reconfigured old services to better accommodate consumer preferences, and deployed new technologies and practices."[5]

In short, public utility and common carrier regulations have thwarted competition, subjecting consumers to poor service quality and higher prices, relieved only following deregulation.

Advocates for net neutrality uphold the end-to-end principle as a policy goal. Neutrality means that the internet merely transfers data while applications at the edge manage the data (e.g., spam filters, etc.) and determine how the data is used (e.g., email, web browser, etc.). The creative component of the internet is exclusively as the edge; the pipes are simply a mechanism to connect these islands of creativity. Yet increasing traffic and new applications highlight the need for better traffic management, and ensuring QoS has raised questions about whether the network itself requires more intelligence.

[5] Quoting Costello and Graniere, 1996, National Regulatory Research Institute, Crandall, Robert and Jerry Ellig, "Economic Deregulation and Customer Choice," The Mercatus Center (Center for Market Process), 1997. https://www.mercatus.org/system/files/MC_RSP_RP-Dregulation_970101.pdf

By definition, common carriage regulations force broadband networks into "dumb" pipe providers. Not only does this limit innovation, but it may also reduce competition in the "last mile," the very concern that fuels much of today's debate. In a competitive market, investments will only be undertaken if there is a reasonable chance to generate a return on the capital outlay. Innovation and experimentation allow broadband providers to offer new opportunities for networks and deployment.

Dumb pipes, on the other hand, are an undifferentiated commodity, which reduces incentives to deploy in an area already served by an incumbent broadband provider. In today's market, it is the new capabilities of high-speed broadband, including faster internet connections, video streaming, and the emerging Internet of Things that are driving deployment. Providers are competing in terms of both speed and service, seeking to offer consumers a unique and enjoyable online experience. However, Title II public utility regulation can reduce the network to a commoditized service, limiting the margins for competition and reducing incentives to invest in critical infrastructure. Evidence suggests internet service providers have already substantially scaled back infrastructure investment since public utility regulation was first floated by FCC officials in 2010. According to a study from the Phoenix Center for Legal & Economic Public Policy Studies, providers have reduced investment between $150 billion and $200 billion versus projections.[6] This means consumers generally face fewer choices in the internet service provider market. Consequently, Title II public utility regulation could generate greater

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[6]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

concerns over market power than exist in today's internet, while making QoS and pricing experimentation difficult.

As new technologies emerge and broadband networks continue to expand, the internet is showing its age. Streaming video has replaced the static web page, and real quality of service (QoS) issues are surfacing. Title II regulation effectively freezes the internet's development at a stage that may be inappropriate for future use patterns. Moving forward, it is not surprising that new tools for network management may be required. One study notes, "Greater bandwidth and processing power alone will not solve all congestion and QoS problems on the Internet. This is because the Internet involves the use of scarce resources, and when treated otherwise, theory and evidence suggests that congestion will become a problem, undermining convergence and the development of services that require superior QoS statistics."[7]

Title II proponents, on the other hand, are wary of new pricing mechanisms for better network management. Instead, they have endorsed Title II's public utility regulation, something that may limit innovation. A simple survey of the marketplace suggests the potential impact of regulation. Since deregulating the market for telecommunications, there has been an explosion of products available for the end consumer. The regulatory era was marked by a limited set of choices for consumers, with most consumers having access to little more than a simple rotary phone. However, beginning with the Carterphone decision in 1968, the FCC eased regulatory restraints on third party hardware connecting to the phone network and the result was a rush to market

[7] The Wik Consult, *The Economics of IP Networks—Market, Technical and Public, Policy Issues Relating to Internet Traffic Exchange*, Study for the European Commission, May 2002, p. 162.

of new products, from fax machines to answering machines to any number of telephones, all of which was marked by significant decreases in price.[8]

FCC's Call for Cost Benefit Analysis

In the current NPRM on Restoring Internet Freedom, the FCC requests comments on the role of cost-benefit analysis.[9] FreedomWorks Foundation strongly supports the use of cost-benefit analysis to ensure that any regulation regulating the internet does not impost costs greater than the benefits associated with the regulation.

To better evaluate the impact of Title II public utility regulation relative to light touch regulation on BIAS providers, the FCC should rely on the guidelines for regulatory analysis laid out in OMB Circular A-4.[10] Very briefly, these guidelines provide the basic steps for regulatory analysis to ensure that any regulation addresses a specific problem in the most effective manner. First, the problem to be addressed must be clearly identified, and any information about the need for federal action and the potential consequences of that action should be provided. Second, the FCC should conduct a regulatory analysis of the rule to demonstrate the benefits of the rule exceed the costs imposed on consumers and the economy. Third, FCC should identify and adopt the least costly approach to

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[8] Robert Crandall, *After the Breakup: The U.S. Telecommunications Industry in a More Competitive Era*, The Brookings Institution, 1991. It should be noted that some have pointed to the Carterphone decision as a means of instituting net neutrality (for instance, Tim Wu, "Wireless Net Neutrality: Cellular Carterfone on Mobile Networks," New America Foundation, Working Paper no. 17, ver. 2.1, February 2007. However the analogy is inapplicable here. The initial decision was issued in a market defined by a regulated monopolist. Carterphone, in effect, eased regulatory restrictions for entering the market. In today's broadband market, such a decision, would impose a new regulatory burden on a market that the FCC views as competitive.

[9] FCC,"Restoring Internet Freedom," NPRM, 105-115.

[10] Office of Management and Budget, Circular A-4, "Regulatory Analysis," September 17, 2003, available at https://www.whitehouse.gov/omb/circulars_a004_a-4.

resolving the problem, comparing among alternative approaches and adopting the low cost solution. The circular provides more details on regulatory analysis, but these three points are the crux of the analysis. Proper analysis may demonstrate that the existing FTC framework provides the most efficacious approach for protecting consumer privacy.

This should include a clear identification of the potential market failure as well as a cost-benefit analysis that identifies the least cost method of addressing any market imperfections that have been demonstrated. Absent clear benefits, the FCC should opt for a light-touch approach to regulating, that allows the market to evolve and innovate.

Further, under the Regulatory Flexibility Act, the FCC is required to evaluate the impact of the rule on small business. For small BIAS providers, the costs of compliance could be significant, and it is incumbent upon the Commission to evaluate this regulatory burden. It is important to determine if the rule may have the unintended consequence of reducing competition by eliminating smaller BIAS providers who find the new Title II regulatory regime cost-prohibitive.

Title II and Innovation

Although the Internet, up to this point, has evolved largely in a market-based setting, the new Open Internet Order poses a potential threat to all businesses using the internet, particularly with respect to broadband deployment and upgrading the internet to handle new data-intensive applications.

With some clarification, the Federal Communications Commission, under Chairman Kevin Martin, released a policy statement on internet freedom in 2005 that included four main principles outlined by the previous FCC Chairman, Michael Powell.

More importantly, the Policy Statement also asserted that the FCC had the authority to ensure that the internet was operated in a neutral manner. Nonetheless, advocates of net neutrality found these principles wanting, and sought to strengthen these principles. In particular, they sought to add a fifth principle on "nondiscrimination" that would prohibit distinctions between data packets.

To date the internet has evolved relatively free from federal regulation. This flexibility has created an important resource that continues to develop to meet a growing demand among consumers and businesses. Moreover, that demand has generated new products that may require new tools for network management. It is not in the public's interest to give the government the job of controlling this evolution. Whether pipes are dumb or smart should be determined by those managing the network, as should decisions on handling the burgeoning flow of information over the internet.

At the same time, it should be remembered that federal antitrust laws and laws against anticompetitive practices continue to provide significant regulatory oversight of the market, even in the absence of new net neutrality mandates such as Title II public utility regulation. In the most significant example of anticompetitive behavior relating to internet access, it is worth noting that the FCC immediately intervened, as did Canadian authorities. An ISP, Madison River, was blocking Vonage on its network, and regulatory authorities promptly issued a fine and forced the ISP to allow access to its network.[11]

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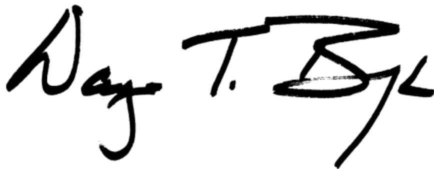
[11] Alfred E. Kahn, "A Democratic Voice of Caution on Network Neutrality," Release 2.24, Progress and Freedom Foundation, October 2006, p. 2, available at http://www.pff.org/issues-pubs/ps/2006/ps2.24voiceofcautiononnetneutrality.pdf.

As the online world matures, questions of market power may arise that cut across all market participants. Net neutrality has, to date, focused primarily on the physical layer. Yet market power can exist elsewhere. The diversity of potential sources of market power suggests that the existing antitrust laws and laws against anticompetitive practices embody a degree of flexibility that makes them more aptly suited to addressing any problems than an *ex ante*, proscriptive net neutrality regulation such as Title II.

Respectfully submitted,



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