State and Local Efforts to Regulate an Open Internet are Unnecessary and May Curb State Broadband Investment

The Internet Remains Open and Free – Consumer Protections Remain in Place

Q: Why is the Federal Communications Commission (FCC) decision to rollback regulation positive for consumers and the internet ecosystem?
A: The FCC restored the light-touch regulatory framework that allowed the internet to grow and thrive from 1996-2015. They reversed the decision to regulate the internet under the old public utility laws – written over 80 years ago for the analog-age and monopoly telephone service. These rules included regulatory reporting requirements that overwhelmed small internet service providers, reduced their investment capabilities and hindered their ability to bring new and exciting services to their customers. They also give too much power to unelected federal bureaucrats who want to control how the internet operates. That means less freedom for consumers and innovators. No one wants the Internet to be run like their local water or electric company.

Q. How will consumers be impacted?
A. Consumers will see no negative changes to how their internet works. To the contrary, under the restored rules, consumers can expect to see ***more*** investment in broadband and more innovative services, reversing the adverse effect of the previous rules. There's overwhelming evidence the FCC's 2015 rules slowed broadband deployment nationwide, especially in rural and underserved communities:

- Within 3 months of the FCC's 2015 vote, several ***rural Internet providers*** stated under oath that Title II's legal uncertainties had slowed broadband deployment.

- Overall broadband investment ***has dropped*** by billions since 2015 – the first time this has ever happened outside of a recession.

State Legislation is Unnecessary and Risky

Q. Why is legislation at the state-level unnecessary?
A. Strong protections remain in place to ensure the core net neutrality principles of no blocking, no throttling, and no unfair discrimination of internet traffic. The FCC order

requires providers to clearly and publicly disclose their network management practices, and the terms and conditions of their broadband service offerings. In their disclosures, providers have publicly committed to no blocking, no throttling, and no unfair discrimination of Internet traffic, commitments that are fully enforceable under the new FCC order.

Any provider breaching such commitments would face heavy fines and penalties – to say nothing of a customer revolt. Antitrust and state consumer protection authorities also can take action to remedy other practices that harm consumers.

Q. What about the net neutrality violations I hear about?
A. Proponents of heavy-handed forms of net neutrality rely on hyperbole and hypotheticals to try to create support for their extreme positions. That's because real examples are difficult to come by and many of the most frequently cited "net neutrality violations" are simply false, misleading or mistaken. A couple of isolated cases that occurred a decade or more ago were quickly abandoned or resolved by corrective action by the FCC – all without heavy handed regulation that stifles broadband investment.

Q. What are some of the unintended consequences of passing net neutrality regulations at the state or local level?
A. Imagine 49 other states telling your constituents and local businesses what they can and can't do on the Internet? That's what would happen with a patchwork of inconsistent regulation at the state level. State by state (and even worse, municipality-by-municipality) regulation of the internet would confuse consumers, harm competition, and impede innovation and investment. The internet does not stop at the state line.

State legislation has a greater risk to suppress capital investment and hamper innovation of new technologies than it does to protect consumers. Subjecting companies who invest most in broadband to a host of disparate regulatory obligations only threatens to push state level broadband investment elsewhere. Investment in broadband is a key component to a thriving economy and free commerce.

Q. What do I tell my constituents who are concerned about preserving an open internet?
A. The framework put in place by the FCC is not an abandonment of the open Internet, but simply a return to the light touch framework that the FCC used to govern the Internet for over 20 years from its inception until 2015. This framework has a proven track record of protecting consumers over the decades of the internet's growth while also driving unprecedented investment and innovation. Additional state and local laws and regulations are not necessary – Internet service provider commitments to refrain from blocking, throttling, and unfair discrimination of Internet traffic already are publicly disclosed and enforceable under the new FCC order.

What Others Are Saying About Net Neutrality

Neil Bradley, U.S. Chamber of Commerce Senior Vice President and Chief Policy Officer

"Today's FCC vote to undo the 1930s rotary-phone era regulation of the internet will restore certainty to the private sector and encourage investment in the broadband infrastructure necessary to power emerging technologies that contribute to economic growth. The *Restoring Internet Freedom Order* passed today is simply a return to the regulatory framework that allowed for a thriving internet, before the FCC placed it under unnecessary public-utility-style treatment."

- Neil Bradley, ***"U.S. Chamber Supports FCC's Repeal of Public Utility Treatment of Broadband, Encourages Congress to Protect Net Neutrality Principles,"*** December 14, 2017

National Black Chamber of Commerce

"Small businesses understand that economic progress comes from giving entrepreneurs the freedom to innovate and invest. Businesses today need ever-faster broadband connections to compete, which will only be possible with greater investment in our nation's network infrastructure… Treating dynamic broadband networks like public utilities is a great way to discourage much-needed investment and delay innovation. Title II was designed to regulate Depression-era telephone networks, not the modern internet."

- ***National Black Chamber of Commerce Position Statement***, May 18, 2017

T-Mobile

"The Commission should revise its regulatory regime recognizing that one-size-fits-all solutions are likely to restrict the options available to consumers and thus undermine consumer welfare. Mobile broadband customers have, and make, many choices regarding the nature of the services to which they subscribe. These choices allow them to configure their services in ways that best suit their own lives and needs. For example, customers can choose from a variety of rate plans with differing features, such as picking Standard Definition rather than High Definition video to conserve data or save money.

"Congress must act to eliminate regulatory uncertainty. Absent such action, ambiguities regarding the Commission's legal authority in this arena will lead to repeated disputes and shifting regulatory seesaws. The Commission should support an appropriate legislative solution to finally resolve this matter with a non-Title II Open Internet framework."

- ***Comments of T-Mobile before the FCC***, July 17, 2017

David L. Cohen, Comcast Senior Executive Vice President and Chief Diversity Officer

"This is not the end of net neutrality. Despite repeated distortions and biased information, as well as misguided, inaccurate attacks from detractors, our Internet service is not going to change. Comcast customers will continue to enjoy all of the benefits of an open Internet today, tomorrow, and in the future. Period. Consumers will remain fully protected. We have repeatedly stated, and reiterate today, that we do not and will not block, throttle, or discriminate against lawful content. These fundamental tenets of net neutrality are also key components of our core network and business practices – they govern how we run our Internet business."

- David L. Cohen, ***"Reconfirming Comcast's Commitment to an Open Internet and Net Neutrality,"*** December 13, 2017

Brendan Carr, FCC Commissioner

"Next month's FCC vote will simply return the Internet to the same regulatory framework that governed in 2015 and for the 20 years that preceded it. The Internet flourished under this approach, while consumers and innovators alike benefited from a free and open Internet.

"In other words, the FCC is not experimenting with a radical new or anarchic approach to the Internet. Instead, we're returning to the tried-and-true framework that protected consumers without the negative results we've seen during the FCC's two-year detour into heavy-handed, utility-style regulation…"

- Brendan Carr, ***"No, the FCC is not killing the internet,"*** *Washington Post*, November 30, 2017

Berin Szoka, TechFreedom President

"Should broadband providers be regulated under Title II of the 1934 Communications Act — a law written for the old telephone monopoly? No, insisted a bipartisan group of senators in 1998, including Democrats John Kerry (Mass.) and Ron Wyden (Ore.), warning that such micromanagement and resulting uncertainty "seriously would chill the growth and development" of broadband."

- Berin Szoka, ***"How Net Neutrality Advocates Would Let Trump Control the Internet,"*** *Washington Post*, July 19, 2017

James E. Prieger, Associate Professor of Public Policy, Pepperdine University

"Those who foresee dire consequences for the future of the American Internet from rolling back the 2015 Title II regulation ignore the great success and continued growth of the Internet over the past two decades – growth that occurred (until 2015) in the absence of net neutrality regulation."

- James E. Prieger, ***"Reactions to the FCC's Restoring Internet Freedom Draft Order,"*** December 14, 2017

22 Small ISPs

"We support an open Internet, our customers expect it and would depart if we degraded their Internet experience. Two years ago, many of us urged the Commission to refrain from subjecting our broadband Internet access service to Title II 'utility style' regulation because that approach was not justified by sound economics or market realities for smaller ISPs and would impose onerous burdens on our operations. Unfortunately, the Commission ignored this evidence, classified us as common carriers, and adopted one-size-fits-all rules. In the wake of this decision, our businesses have suffered…In brief for us and our customers, the rules have been all cost and no benefit."

- 22 Small ISPs in a ***letter to Chairman Pai***, April 25, 2017

Will Johnson, Verizon Senior Vice President of Regulatory Affairs

"Verizon fully supports the open Internet, and we will continue to do so," Johnson said in an emailed statement. "Our customers demand it and our business depends on it."

- Jackie Wattles, ***"Net neutrality repeal: Facebook, Amazon, Netflix and internet providers react,"*** *CNN*, December 14, 2017

Brent Wilkes, LULAC CEO

"LULAC is calling for a New Deal on Internet equality that puts the interests of consumers and would be consumers before the interests of those who have traditionally monopolized Internet conversations… We must work toward broadband access that is universally accessible, restoring privacy back to the hands of consumers, and ensuring diverse voices have a seat at the table in conversations that have traditionally been dominated by non-diverse content providers. Based on what we have seen, it is clear that the FCC's existing Network Neutrality Rules are not enough… to stop non-diverse monopolies from commandeering the Net."

- Brent Wilkes, ***"It is Time for a New Deal on Internet Equality,"*** *The Hill*, October 9, 2017

Nicol Turner-Lee, Center for Technology Innovation

"As of this writing and at least for the next few months, the internet is still working. No web sites have been blocked or throttled. The civil liberties that some of us enjoyed online yesterday remain intact…

"Clearly, the FCC's decision has primed the nation for round three of the open internet debate, but this time, Congress should deliver bipartisan legislation that brings certainty and perhaps peace to individuals, large and small companies, entrepreneurs, and a government that desire a flourishing digital economy absent of systemic consumer harms. Before net neutrality ends up in an inflexible court decision, Congress should step in and advance a framework that balances rather than shames polarized interests."

- Nicol Turner-Lee, ***"The Internet Still Works After the Net Neutrality Repeal. Now Congress Must Act to Save It,"*** *Brookings Institution*, December 15, 2017

The USTelecom and Broadband Association

"Today, the future of our open, thriving internet has been secured," the group, which represents companies including AT&T and Verizon, wrote. "America's broadband providers – who have long supported net neutrality protections and have committed to continuing to do so – will have renewed confidence to make the investments required to strengthen the nation's networks and close the digital divide, especially in rural communities."

- Jackie Wattles, ***"Net neutrality repeal: Facebook, Amazon, Netflix and internet providers react,"*** *CNN*, December 14, 2017

David Balto, Previous Justice Department antitrust attorney

"Conflict and partisanship makes good TV, but on this issue a simple bipartisan solution is available and at hand. Congress could easily pass a bipartisan law to make net neutrality permanent and put enforceable rules in place for good. Support for this approach is building on the left and right and FCC Chairman Pai has indicated it may provide the simplest path forward."

- David Balto, ***"What John Oliver Won't Tell You About Net Neutrality,"*** *The Hill*, May 5, 2017

Katie McAuliffe, Digital Liberty Executive Director & Americans for Tax Reform Federal Affairs Manager

"The truth is that Title II and net neutrality are two different things. Title II deals with economics, investment, and micromanagement of business operations. Net neutrality deals with traffic flow, transparency, and basic principles of openness and non-discrimination. The FCC enacted net neutrality rules without Title II in the past, and Congress considered net neutrality laws having nothing to do with Title II as well.

"Title II is not the answer. Antitrust laws address many of the concerns about Internet openness and transparency already. The FCC must complete its work undoing the mess of Title II as quickly as possible. Congressional action to stop this endless game of pong is the best path forward."

- Katie McAuliffe, ***"The FCC Must Get Rid of Archaic Internet Regulations to Unleash the Modern Digital Economy,"*** *Daily Caller*, November 15, 2017

Adonis Hoffman, Business in the Public Interest Chairman

"Harking back to the Clinton and George W. Bush years, the principle of light touch regulation seems to have worked well for the stability and growth of the internet. Although recently unpopular, this seems to be a commercially reasonable position that encourages more investment in broadband, while attending to consumer demands. And yet, the simple rationality of the argument has been drowned out by the clarion calls to resist any changes to the rules."

- Adonis Hoffman, ***"There is a Middle Ground in the Net Neutrality Debate,"*** *The Hill*, May 15, 2017

Michael Mandel, Progressive Policy Institute Chief Economic Strategist

"As we have said before, the Internet was thriving under the light-touch regulatory regime that preceded Title II. Indeed, government data shows that the telecom industry was one of the top contributors to US productivity growth from 2000 to 2014, before Title II was put in place. Our belief is that the economy could be entering into a renewed period of productivity growth, propelled by the application of digital technology to the physical industries (see The Coming Productivity Boom). That transition would have been much more difficult under the antiquated regulatory structure that comes with Title II."

- Michael Mandel, ***"Open Internet: Time for Congress to Act,"*** *Progressive Policy Institute*, May 18, 2017

Fred Campbell, TechKnowledge Director

"Net neutrality advocates worry that ISPs could erect internet "toll booths" while ignoring the 30% toll that Apple charges app developers for the privilege of offering their products and services to consumers who use Apple devices. They worry that ISPs could silence a critical blogger while supporting a law that encourages Google and others to censor legal content without consequence. They worry that ISPs could make it harder for a new social network to reach the market while ignoring the fact that Google and Apple won't let social network Gab into their app stores. While net neutrality advocates were busy fretting about ISPs, monopolistic ad platforms have sucked most of the internet's value from consumers and content creators — and they've done it using the same practices that net neutrality advocates denounce. Democrats' ISP-focused net neutrality rules are hopelessly ill-suited to such a task. They can't ensure a free flow of information on the internet."

- Fred Campbell, ***"Maybe We Should 'End the Internet as We Know It',"*** *Forbes*, October 2, 2017

Jamal Simmons, Internet Innovation Alliance Co-Chairman

"Congress should be able to work together to find a solution to a problem that impacts business executives and consumers of both political parties… Internet Service Providers agree there should not be throttling of speeds or blocking of content. Consumers want the benefits of more applications and choices that come from innovative companies and a regulatory landscape that protects users and startups from anti-competitive practices."

- Jamal Simmons, ***"It's Time to Pass A Bill That Protects the Internet,"*** *The Hill*, May 18, 2017

Mike Montgomery, CALInnovates Executive Director

"Since 2005, here's the scorecard: three attempts by the Federal Communications Commission (FCC) to implement net neutrality rules, two reversals, endless litigation and a whole lot of outrage by interest groups and think tanks on all sides of the issue that rely on perpetual conflict to fundraise… This endless loop is not doing most stakeholders any good; not the small businesses that net neutrality is designed to protect from being relegated to slow lanes, nor the consumers who want the new services and ever-increasing internet speeds that innovation and investment create…."

- Mike Montgomery, ***"End the Policy Ping-Pong, Cement Net Neutrality into Law,"*** *The Hill*, August 28, 2017

FCC'S PREEMPTION OF STATE REGULATION OF THE INTERNET

State or local legislation that seeks to impose on providers of broadband internet access service common carrier-style regulation from the FCC's 2015 *Title II Order* is preempted by the Communications Act and the federal policy of light-touch regulation of such services. In the 2018 *Restoring Internet Freedom Order*, the FCC exercised its well-recognized authority to preempt inconsistent state regulations and expressly preempted all state laws and regulations that interfere with its pro-competitive and light-touch approach to regulating broadband internet access service. This is a proper exercise of its authority that has been upheld in closely analogous circumstances.

Preemption is also compelled by the Communications Act itself. The *Restoring Internet Freedom Order* restored the historical classification of mass-market retail broadband internet access services as "information services" and mobile services as a "private mobile service" — classifications that for similar services have been upheld by courts including the United States Supreme Court. The Communications Act expressly forecloses common carrier-style regulation of providers of information service and private mobile services, such as prohibitions on blocking, throttling, paid prioritization, and the internet conduct standard.

In The 2018 *Restoring Internet Freedom Order*, The FCC Expressly Preempted State Laws That Interfere With Its Policy Of Light-Touch Broadband Regulation

In the *Restoring Internet Freedom Order*, the FCC concluded that "regulation of broadband internet access service should be governed principally by a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements." *Id.* ¶ 194. The FCC expressly preempted state and local regulation that interferes with its pro-competitive and light-touch policy regarding broadband regulation.

- In the *Restoring Internet Freedom Order*, the FCC established a "calibrated federal regulatory regime based on the pro-competitive, deregulatory goals of the 1996 [Telecommunications] Act." *Id.* ¶ 194. The FCC preempted any state regulation that would "disrupt the balance" or "interfere with the federal deregulatory policy" in the *Restoring Internet Freedom Order*. *Id.* ¶¶ 194, 196.
- The FCC specifically preempted "any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing," or that would "impose more stringent requirements for any aspect of broadband service" addressed by the *Restoring Internet Freedom Order*. *Id.* ¶ 195. This includes "economic" or "public utility-type" regulations akin to common carrier requirements imposed by Title II of the Communications Act. *Id.*
- Although the FCC did not consider it necessary to disturb states' "traditional role in generally policing such matters as fraud, taxation, and general commercial dealings," it indicated that such laws would be preempted to the extent that they "interfere[d] with federal regulatory objectives." *Id.* ¶ 196.

Courts Have Long Recognized The FCC's Power To Preempt State Laws, Including Laws That Interfere With A Policy Of Light Touch Regulation

The FCC's authority to preempt state regulation is well established and widely recognized. In the *Restoring Internet Freedom Order*, the FCC properly exercised that authority to preempt state regulation that interferes with its pro-competitive and light-touch approach to regulating broadband internet access service.

- Courts have long recognized the FCC, like all federal agencies, has broad authority to preempt state laws that conflict with its regulations, and to "determine that its authority is exclusive and preempt[] any state efforts to regulate in the forbidden area." *City of New York v. FCC*, 486 U.S. 57, 64 (1988). The FCC may use this power to preempt laws that interfere with its policy. *See Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 580-81 (8th Cir. 2007) ("Competition and deregulation are valid federal interests the FCC may protect through preemption of state regulation.").
- The FCC has exclusive jurisdiction over interstate communications, and the authority to preempt state regulation of such communications. *See* 47 U.S.C. § 152; *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986). And the FCC has repeatedly held, under both Democratic and Republican control, that internet service is an interstate communications service. *See Restoring Internet Freedom Order* ¶ 199 & n.739.
- Courts have upheld prior FCC decisions preempting state regulation of jurisdictionally interstate internet services, such as Voice over Internet Protocol, where the FCC similarly adopted a federal policy of non-regulation and identified the need for "sole regulatory control." *Vonage Holdings Corp. v. Nebraska Pub. Utils. Comm'n*, 564 F.3d 900, 905 (8th Cir. 2009); *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 580-81 (8th Cir. 2007) ("any state regulation of an information service conflicts with the federal policy of noregulation"); *see also California v. FCC*, 39 F.3d 919, 932-33 (9th Cir. 1994).
- The FCC's preemption determination in the *Restoring Internet Freedom Order* is well within the scope of its authority, and is sure to be upheld under the deferential standard that reviewing courts apply. Those courts "should not disturb" the FCC's decision where, as here, it "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute." *City of New York*, 486 U.S. at 64.

States Cannot Impose Common Carrier Regulations On Information Services Or Mobile Broadband Services

Even aside from the FCC's express statements, the FCC's classification of mass-market broadband internet access service as an "information service" and a "private mobile service" itself preempts states from imposing the 2015 *Title II Order* requirements on any provider of broadband internet access service.

- Under the Communications Act, providers of interstate communications can be subjected to common-carrier regulation only to the extent that they are providing

telecommunications services. *See Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014). Providers of "information services" cannot be required to operate as common carriers. *See id.*

- The Communications Act also expressly protects providers of private mobile services from common carrier obligations. *See Verizon*, 740 F.3d at 650; 47 U.S.C. § 332(c)(2).

- In the *Restoring Internet Freedom Order*, the FCC returned mass-market retail internet service to its historical classifications as an "information service." *Restoring Internet Freedom Order* ¶¶ 20, 26-64. The *Restoring Internet Freedom Order* also returned mass-market mobile internet services to its historical classification as a private mobile service. *Id.* ¶¶ 65-85.

- The FCC had already held, in a series of orders issued from 2002 through 2007, and affirmed by the courts, including the Supreme Court, that all other broadband internet access service — including services sold to enterprise, institutional, and government customers — is an information service and private mobile service. *See*, *e.g. Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 997 (2005); *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205, 220 (3d Cir. 2007).

- The result of these classifications is that nobody — not the FCC and not the states — can impose common carrier requirements on providers of any broadband internet access service.

- The prohibitions on blocking, throttling, and paid prioritization as well as the internet conduct standard the FCC adopted in its 2015 *Open Internet Order* are all common carrier requirements. *Verizon*, 740 F.3d at 655-56.

- Therefore, the Communications Act preempts any state attempt to impose such requirements on broadband internet access providers, which cannot be compelled to operate under common-carrier obligations.