THE HON. ROBERT M. MCDOWELL
Questions for the Record from the Jan. 21, 2015 Senate Commerce Committee Hearing:
"Protecting the Internet and Consumers Through Legislative Action"
—The views expressed herein are strictly my own and do not necessarily represent the views of Wiley Rein, any of its clients, or the Hudson Institute—

MEMBER REQUESTS FOR THE RECORD

The Honorable Deb Fischer

1. *Mr. McDowell* – Please explain how Title II regulations would inhibit American dominance and global competitiveness in "Internet of Things?"

   Thank you, Senator, for the opportunity to offer my views on this important topic. Over the past few years, the world has witnessed an explosion in the development of the "Internet of Everything" fueled by America's tech sector. From innovations with dramatic implications for the health and automotive sectors, to developments that improve the everyday lives of ordinary people, the Internet of Everything is transforming the global economy. In fact, Cisco estimates that, over the next decade, the Internet of Everything will result in more than $14 trillion in global economic growth as the number of Internet-connected devices rises to around 50 billion.[1]

   To ensure our tech sector remains the envy of the world, we must continue to follow the open and permission-less approaches to innovation that have worked so well thus far. For example, America is, and always has been, the global leader in wireless technology and services by avoiding burdensome regulations.[2] In the absence of harmful Title II regulations, America's wireless broadband market has become fiercely competitive—driving massive investment and innovation that has contributed to, and will continue to contribute to, vital economic growth.[3] In light of the unprecedented success we've seen as the Internet economy has continued to develop, it is difficult to imagine why some advocate turning away from tried-and-true policies in favor of a stifling regulatory regime designed for an era of vacuum tubes and rotary-dial telephones. Indeed, black rotary-dial telephones were "state-of-the-art" for 40 years, even though technology and innovation allowed better consumer experiences. Imposing this antiquated regime on the vibrant Internet economy will threaten American innovation and future economic growth.

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[1] Joseph Bradley, et al., *Embracing the Internet of Everything to Capture Your Share of $14.4 Trillion*, Cisco Internet Bus. Solutions Grp. (2013), *available at* http://www.cisco.com/web/about/ac79/docs/innov/IoE_Economy.pdf; *see also* Federal Trade Commission, *Internet of Everything: Privacy and Security in a Connected World*, at i (Jan. 2015), *available at* http://www.ftc.gov/system/files/documents/reports/federal-trade-commission-staff-report-november-2013-workshop-entitled-internet-things-privacy/150127iotrpt.pdf (noting that "[s]ix years ago, for the first time, the number of 'things' connected to the Internet surpassed the number of people").

[2] *See* Ovum's Informa Telecoms & Media World Cellular Information Service (WCIS+) (as of Sept. 2014) (noting that U.S. consumers, who make up less than 5% of the world's population, account for more than 37% of the world's LTE subscribers).

[3] *See* 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 (estimating that, from 2013 to 2017, wireless investments will generate as much as $1.2 trillion to the economy and add up to 1.2 million new jobs).

The speed at which the Internet has been able to develop and flourish was a direct result of the Clinton Administration's policy of keeping the government's hands off of the Internet sector. As former FCC Chairman William Kennard stated, "[i]t 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."[4] The Clinton-era view has enjoyed strong bipartisan support, until recently. While the proposed legislation honors this hands-off tradition, as Chairman Kennard warned, Title II classification of broadband would represent a dramatic departure from the policies that have allowed the Internet to become the fastest growing disruptive technology in human history.

America's tech sector will not be immune from Title II common carrier regulation if the FCC attempts to regulate broadband Internet access services under Title II. Over my career as an FCC Commissioner and as an attorney, I have had extensive experience interpreting and enforcing Title II, and I can confidently say that "tech" companies are likely to be swept up into Title II's regulatory vortex along with the targeted network operators. As innovation and consumer demand continue to blur the lines between what used to be clearly delineated legal and regulatory silos between network operators (such as phone, cable and wireless companies) and "tech" companies that offer "information services"—such as computer processing and data storage processing, as well as content and application providers—it will become increasingly difficult for bureaucrats to parse with surgical precision the differences between transmission and information services.[5]

For example, many application and content providers, content delivery networks, and providers of services offered through connected devices provide transmission services as a component of their information services, such as the CDNs that give us Netflix movies or YouTube videos. The same is true for search engines that connect an advertising network to a search request and for email providers and social networks that enable chat or messaging sessions. Some tech companies sell other services, such as e-reader services, but buy wireless access on a wholesale basis to deliver their content. Such synergistic deals would be complicated—at best—under Title II because the e-reader service provider would be considered a reseller of telecommunications services under Commission precedent. In a Title II world, tech companies offering these and similar services will be forced to make vital decisions on long-term investments and business strategies affecting the Internet of Everything, while facing the prospect that they may one day be subjected to increasingly costly and stifling regulations.

As a group of entrepreneurs, including Mark Cuban, recently explained, Title II classification of the Internet will fundamentally blur the lines between regulated and unregulated networks

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[4] Remarks of the Hon. William E. Kennard, Chairman, FCC, *Voice Over Net Conference: Internet Telephony: America Is Waiting* (Sept. 12, 2000) ("We 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.").

[5] *See, e.g., Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Docket No. FCC-02-77, 17 FCC Rcd 4798, ¶ 40 (2002) (noting the increasing difficulty in distinguishing between "transmission" and "information" services).

and services—making it "impossible for entrepreneurs to know whether their IP-based offering will be subject to Title II regulation . . . [thus] undermin[ing] the very innovation and investment that the Commission purportedly seeks to protect."[6] Furthermore, "[t]his concern is particularly acute in an era where all new consumer electronics and information technologies include a component the Commission could conceivably view as a 'telecommunications service.'"[7]

As legal scholars have observed, regulation tends to grow.[8] For example, recent actions by regulators and courts in Europe, which view "Internet companies" as a single category, have led to regulations that grow heavier by the day. As a result, particularly in the wireless broadband sector, America has gained a substantial advantage over Europe in terms of investment, connection speeds, and innovation. European broadband providers have invested considerably less ($244 per household) in their networks than their American counterparts ($562 per household).[9] Recent data show that 82 percent of all Americans have access to 25 Mbps speeds using wired broadband, while only 54 percent of Europeans have access to comparable broadband service.[10] European regulators lament that broadband providers are "reluctant to invest large sums in new high-speed networks" in Europe, that "Europe is losing the global race to build fast fixed broadband connections," and that "frustrated consumers are stuck in the internet slow lane."[11]

Subjecting the flourishing Internet of Everything to the risk of Title II regulation will undoubtedly hamstring America in its ability to compete with the rest of the world. American technology companies that derive a competitive advantage from our country's historic commitment to innovation without permission and the ability to adjust rapidly to changes in consumer demand may soon find themselves sidelined, waiting for Washington's approval, as their competitors take advantage of waning American influence. Tech companies that assume they would be insulated from the burdens of Title II could turn out to be sorely mistaken.

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[6] VCXC Ex Parte, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28 (Jan. 23, 2015), *available at* http://apps.fcc.gov/ecfs/comment/view?id=60001010900.

[7] *Id.*

[8] Berin Szoka & Adam Thierer, *Net Neutrality, Slippery Slopes & High-Tech Mutually Assured Destruction*, Tech. Liberation Front (Oct. 23, 2009), http://techliberation.com/2009/10/23/netneutrality-slippery-slopes-high-tech-mutually-assured-destruction/ ("The reality is that regulation *always* spreads. The march of regulation can sometimes be glacial, but it is, sadly, almost inevitable: Regulatory regimes grow but almost never contract.").

[9] Christopher S. Yoo, *U.S. vs. European Broadband Deployment: What Do the Data Say?*, at i (June 2014), *available at* https://www.law.upenn.edu/live/files/3352-us-vs-europeanbroadband-deployment; *see also* Erik Bohlin, Kevin W. Caves, and Jeffrey A. Eisenach, "Mobile Wireless Performance in the EU & the US" (May 2013), *available at* http://www.gsmamobilewirelessperformance.com/.

[10] Yoo Report, *supra*, at i.

[11] European Commission Memo 13/756, *Regulatory mess hurting broadband investment: consumers and businesses stuck in slow lane* (Aug. 30, 2013), *available at* http://europa.eu/rapid/press-release_MEMO-13-756_en.htm.

2. *Mr. Simmons and Mr. McDowell* – can you please describe the impacts on a small cable operator in the state of Nebraska of having the FCC force heavy-handed Title II utility regulations. My understanding is the FCC currently has 1,000 active rules based on Title II, occupying nearly 700 pages in the Code of Federal Regulations and that the Progressive Policy Institute recently issued a report highlighting how Title II reclassification of the Internet would add about $15 billion in user fees to our economy, increasing annual levies on middle class families by $67 dollars for wireline service and $72 for wireless broadband.

   You are correct, Senator, that the requirements of Title II are voluminous with extensive, complex, and burdensome provisions that will hit small cable operators and other small broadband providers particularly hard. Like all other broadband providers, small cable operators will likely face increased taxes, costs, restricted access to financing, and reduced opportunities to innovate.

   The regulatory burdens resulting from Title II classification are substantial and include, in part: the regulation of rates, terms, and conditions; non-discrimination requirements (which in fact *allow* reasonable pricing discrimination); entry and exit regulations; confidentiality requirements, audits, and privacy restrictions. Additionally, if the FCC follows through with classifying broadband as a telecommunications service under Title II, broadband providers will be required to contribute to federal and state universal service funds. These taxes and fees will be passed on to consumers, and every broadband customer in America will see a jump in their Internet bills. While large providers will no doubt feel the effect of costs associated with Title II, small providers with fewer resources will be hit particularly hard.

   As I mentioned in my testimony before the Committee, there is one industry that stands to benefit greatly from Title II classification—lawyers. Cable operators generally have not had experience complying with Title II. Without having navigated the morass of Title II's requirements, small cable operators in particular are likely to see their compliance costs surge. They will need to hire regulatory personnel and retain telecom attorneys to advise them on which forms to file and how they can offer their services to the public without running afoul of Title II requirements. That's great for Washington, D.C. lawyers, but a terrible thing for small businesses and American innovation.

3. *To All Witnesses* – While the FCC is in the process of ensuring net neutrality, some want the FCC to impose all of these obligations under the guise of ensuring consumer protection. Some argue that common carrier requirements on broadband providers should include almost most all of Title II, in addition to Sections 201, 202, and 208. Specifically, some activists have suggested the following parts of Title II must be applied to the broadband industry:

   UNIVERSAL SERVICE
   Sec. 214. [47 U.S.C. 214] Extension Of Lines
   Sec. 225. [47 U.S.C. 225] Telecommunications Services for Hearing-Impaired and Speech-Impaired Individuals.
   Sec. 254. [47 U.S.C. 254] Universal Service.
   Sec. 255. [47 U.S.C. 255] Access by Persons With Disabilities.

CONSUMER PROTECTION
Sec. 217. [47 U.S.C. 217] Liability of Carrier for Acts and Omissions of Agents.
Sec. 222. [47 U.S.C. 222] Privacy Of Customer Information.
Sec. 230. [47 U.S.C. 230] Protection for Private Blocking and Screening of Offensive Material.
Sec. 258. [47 U.S.C. 258] Illegal Changes in Subscriber Carrier Selections.

COMPETITION
Sec. 224. [47 U.S.C. 224] Regulation of Pole Attachments.
Sec. 253. [47 U.S.C. 253] Removal of Barriers to Entry.
Sec. 251. [47 U.S.C. 251] Interconnection
Sec. 256. [47 U.S.C. 256] Coordination for Interconnectivity.
Sec. 257. [47 U.S.C. 257] Market Entry Barriers Proceeding.

Do you agree or disagree that these sections of Title II common carrier regulation are needed? If you agree, please explain why.

Senator, you raise a terrific point about the slippery slope of Title II, which has over 1,000 separate requirements. The FCC is essentially legislating as it decides which of those requirements should apply to last-mile broadband networks and the entire Internet backbone in order to benefit politically favored constituencies.[12] Importantly, none of these Title II provisions are needed to protect consumers. Other laws are already in place to help consumers, and the Federal Trade Commission (FTC),[13] state attorneys general, consumer advocates, and trial lawyers are poised to act if broadband service providers were to act in an anticompetitive manner.

In fact, the FCC sought comment on proposals to impose many of these Title II provisions on broadband providers ten years ago—proposals that the FCC did not adopt.[14] In the intervening decade, the Internet has flourished as an engine for innovation and economic growth under a light-touch regulatory approach—under both Republican and Democratic FCC Chairmen—without the need for any of these Title II provisions. As the influential thought-leader of the net neutrality movement, the man who coined the term "net neutrality," Columbia law professor Timothy Wu, recently told Congress, "[o]ne way or another, the

[12] Steve Lohr, *In Net Neutrality Push, F.C.C. is Expected to Propose Regulating Internet Service as a Utility*, N.Y. TIMES, Feb. 2, 2015, *available at* http://nyti.ms/1wXgOoe (noting that Chairman Wheeler may suggest imposing regulations on "companies that manage the backbone of the Internet").

[13] Importantly, Title II classification would effectively strip the FTC of its ability to protect Internet consumers under Section 5 of the Federal Trade Commission Act, because Section 5 includes a common carrier exemption. 15 U.S.C. § 45(a)(2).

[14] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶¶ 146-57 (2005).

light-handed protection of open Internet norms over the last twenty years has served to protect the Internet as an innovation platform."[15]

The sections of Title II that net neutrality proponents are advocating be thrust upon the Internet ecosphere would actually harm consumers by stifling innovation with "mother-may-I" mandates.[16] The core provisions of Title II—Sections 201, 202, and 208—derive from the common carrier regime that Congress imposed on the railroads in the 1880s. These provisions allow the FCC to regulate nearly every aspect of a common carrier's business—including their prices and practices. If the FCC follows through with classifying broadband under Title II, the FCC will delegate to itself the power to impose pervasive rate regulation over the Internet economy.

Moreover, if the FCC were to impose Section 214 on Internet access services, broadband providers could not build new broadband lines or extend existing lines without first obtaining permission from the FCC. Broadband providers, even those operating in communities that enjoy multiple providers, would also be prohibited from discontinuing service to a community or part of a community without first obtaining permission from the FCC. Title II's requirement that providers obtain regulatory permission before introducing or discontinuing services stands in stark contrast to the "permission-less" innovation that has been the hallmark of the Internet. Yet fast-paced innovation has been essential to market success in the Internet ecosystem. If a provider develops a better way to serve its customers, it races to roll out new features or updates quickly in order to stay ahead of the competition. Similarly, if a new service fails to attract customers, a provider must be able to quickly modify or even abandon the service and move on to the next idea. Imagine if something as innovative as the e-reader required FCC oversight at every stage of its development.

Section 222 is the provision of Title II that requires common carriers to protect customer proprietary network information. While it is unclear how the requirements of Section 222 would even operate when applied to the Internet—given that the statute is designed to protect details about customers' telephone calls—some net neutrality advocates may attempt to use this ill-fitting set of FCC regulations to impose heightened privacy restrictions throughout the

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[15] 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.

[16] Comments of Public Knowledge et al. at 88-89, GN Docket No. 14-28 (July 14, 2014) (arguing that "the Commission should not simply forbear from . . . Commission authority over interconnection and shut down of service (Sections 251(a), 256, and portions of 214(c)), discretionary authority to compel production of information (Sections 211, 213, 215, and 218-20), provisions which provide explicit power for the Commission to hold parties accountable and prescribe adequate remedies (Sections 205-07, 209, 212, and 216), provisions designed to protect consumers (Sections 203 and 222), or provisions designed to ensure affordable deployment and the benefits of broadband access to all Americans (Sections 214(e), 225, 254, 255, and 257). These statutes are in addition to the bare minimum recognized in Section 332(c) as the minimum needed to protect consumers—Sections 201, 202, and 208."); *see also* Senate Committee on Commerce, Science, and Transportation, *Protecting the Internet and Consumers Through Congressional Action*, 114th Congress, 1st sess., 2015 (testimony of Gene Kimmelman).

entire Internet ecosystem. Importantly, the FTC already has jurisdiction to protect consumer privacy on the Internet, but Title II classification would strip the FTC of its authority under Section 5's common carrier exemption.[17] Moreover, the restrictions of Section 222 are largely inconsistent with the existing privacy policies of many Internet companies—from search engines and advertising networks, to social network and email providers. Imposing these inconsistent requirements could discourage such companies from pursuing innovative new ways to provide broadband services.

Section 251 is the provision of Title II that requires interconnection and sharing of networks. If the FCC classifies broadband under Title II, interconnection between broadband providers would be subject to government regulation. At the same time, some parties would inevitably seek to use Section 251 to try to require broadband providers to share or "unbundle" their networks at government mandated prices, which would create strong disincentives to invest in new networks. Indeed, Tim Wu recently said that "Title II actually could be used in very bold ways to try and increase competition should a future FCC want to. It creates the option, if the future FCC wanted to, of saying alright . . . we're glad you built that out now we're going to let competitors all use the underlying infrastructure and try and sell services separately."[18] As both the D.C. Circuit and the Commission have explained, however, such "unbundling requirements tend to undermine the incentives . . . to invest in new facilities and deploy new technology."[19]

Section 254 is the provision of Title II that charges the FCC with ensuring all Americans have access to telecommunications and information services. The FCC does not need to regulate broadband under Title II to encourage broadband deployment because the FCC has already exercised—and the courts have upheld—the Commission's Section 254 authority to use the Universal Service Fund (USF) to support broadband deployment. However, if the FCC follows through with classifying broadband as a telecommunications service under Title II, broadband providers will be required to contribute to federal and state universal service funds. These taxes and fees—amounting to as much as $11 billion by some estimates—will be passed on to consumers, and every broadband customer in America will see an increase in their bills.

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[17] 15 U.S.C. § 45(a)(2).

[18] C-SPAN, Communicators with Tim Wu, *Title II & Local Loop Unbundling: Tim Wu discusses how Title II could be used to foster competition through local loop unbundling* (Nov. 12, 2014), *available at* http://www.c-span.org/video/?c4520676/title-ii-local-loop-unbundling.

[19] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 3 (2003); *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 584-85 (D.C. Cir. 2004) (explaining that unbundling requirements are "likely to delay infrastructure investment, with CLECs tempted to wait for ILECs to deploy [broadband-capable loops] and ILECs fearful that CLEC access would undermine the investments' potential return").

The Honorable Marco Rubio

1. What would provide greater certainty for the marketplace – the FCC's adoption of rules that reclassify broadband services as telecommunications services subject to Title II, or enactment of legislation by Congress?

Thank you, Senator, for the opportunity to comment on this issue. Enactment of legislation by Congress would provide far more certainty to the Internet marketplace than FCC regulation of last-mile broadband networks and the entire Internet backbone under Title II.[20] In fact, an FCC decision to impose Title II on broadband providers will increase uncertainty for many businesses, with harmful implications for continued investment and innovation in the Internet economy.

For instance, American technology companies that derive a competitive advantage from our country's historic commitment to innovation without permission and the ability adjust rapidly to changes in consumer demand may soon find themselves waiting for Washington's approval as their global competitors take advantage of our newly-regulated, and therefore slower, "mother-may-I-innovate" regulatory regime. America's tech sector will not be immune from Title II common carrier regulation if the FCC attempts to regulate broadband Internet access services under Title II. Over my career as an FCC Commissioner and as an attorney, I have had extensive experience interpreting and enforcing Title II, and I can confidently say that "tech" companies are likely to be swept up into Title II's regulatory vortex along with the targeted network operators. As innovation and consumer demand continue to blur the lines between what used to be clearly delineated legal and regulatory silos between network operators (such as phone, cable and wireless companies) and "tech" companies that offer "information services"—such as computer processing and data storage processing, as well as content and application providers—it will become increasingly difficult for bureaucrats to parse with surgical precision the differences between transmission and information services.[21]

As a group of entrepreneurs, including Mark Cuban, recently explained, Title II classification of the Internet will fundamentally blur the lines between regulated and unregulated networks and services—making it "impossible for entrepreneurs to know whether their IP-based offering will be subject to Title II regulation . . . [thus] undermin[ing] the very innovation and investment that the Commission purportedly seeks to protect."[22] Furthermore, "[t]his concern is particularly acute in an era where all new consumer electronics and information

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[20] Steve Lohr, *In Net Neutrality Push, F.C.C. Is Expected to Propose Regulating Internet Service as a Utility*, N.Y. TIMES, Feb. 2, 2015, *available at* http://nyti.ms/1wXgOoe (noting that Chairman Wheeler may suggest imposing regulations on "companies that manage the backbone of the Internet").

[21] *See, e.g.*, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Docket No. FCC-02-77, 17 FCC Rcd 4798, ¶ 40 (2002) (noting the increasing difficulty in distinguishing between "transmission" and "information" services).

[22] VCXC Ex Parte, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28 (Jan. 23, 2015), *available at* http://apps.fcc.gov/ecfs/comment/view?id=60001010900.

technologies include a component the Commission could conceivably view as a 'telecommunications service.'"[23]

One thing we know for sure is that, if the FCC proceeds down the Title II path, years of litigation—and resulting uncertainty—will result. When all is said and done, a court of appeals may strike down the FCC's decision to regulate broadband under Title II, as they have done twice before. Such an outcome would be a setback for those who seek enforceable net neutrality rules. Worse yet, the courts may uphold the FCC's decision to impose Title II on broadband providers but overturn its decision to forbear from the vast majority of Title II's requirements. Such a determination could have devastating consequences as the full brunt of Title II is thrust upon the entire Internet marketplace.

On the other hand, Congressional action—such as the proposed legislation—has the ability to provide the protections net neutrality proponents ostensibly seek, while shielding the Internet from harmful regulatory overreach. The proposed legislation would provide far more certainty for businesses and consumers because it would allow the Internet to flourish without the risk of being overturned in court.

2. Chairman Wheeler has suggested that he is planning to go forward with an open Internet rule in February even knowing that members of Congress are working to try to provide the agency with the appropriate tools to prevent blocking, throttling, and paid prioritization.

   Can you tell me why you think the Chairman plans to move forward? And if there is such urgency, wouldn't legislative action not only provide the Commission with better tools but also a foundation that wouldn't require the exhaustive process of forbearance?

   I cannot speak to Chairman Wheeler's state of mind. I am taking the liberty of including a link to a recent *Washington Post* article which sheds some light on this question.[24]

3. In in 2012, I led an effort to pass S. Con. Res. 50., a quote, "Sense of Congress that the Secretary of State in consultation with the Secretary of Commerce, should continue to implement the position of the United States on Internet governance that clearly articulates the consistent and unequivocal policy of the United States to promote a global Internet free from government control and preserve and advance the successful multi-stakeholder model that governs the Internet today." I realize there are distinctions to be made between this bill and the efforts being pursued at the FCC but S. Con. Res. 50 passed unanimously by Congress and sent a strong message to international stakeholders of the Internet.

   With your efforts being involved in Internet governance issues, can you give us a sense of how an FCC ruling on Net Neutrality would be perceived by our international allies who

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[23] *Id.*

[24] Brian Fung, *FCC Chairman Warns: The GOP's Net Neutrality Bill Could Jeopardize Broadband's Vast Future*, WASH. POST, Jan. 29, 2015, *available at* http://www.washingtonpost.com/blogs/the-switch/wp/2015/01/29/fcc-chairman-warns-that-republican-bill-could-jeopardize-broadbands-vast-future/.

look to the United States for leadership on these issues? Should the tech community and consumers here in the US be concerned about what it means for them around the world, as less democratic regimes take notice of the FCC's heavy-handed rules?

Having been part of official U.S. diplomatic delegations to negotiate treaties in the communications space, as well as recently being a member of a blue ribbon panel on Internet governance,[25] I can personally attest to the influence of the American net neutrality debate on international efforts to regulate all corners of the Internet. Vladimir Putin has stated plainly his goal to have "international control of the Internet" through the International Telecommunication Union.[26] In light of Russia's recent expansion into the Crimea and Ukraine, not to mention crackdowns on Internet freedoms, it is now obvious that Putin's threats should be taken seriously. And so should the explicit proposed treaty language of China, Saudi Arabia, Iran and their client states, some of which call for massive multilateral regulation of the Internet including networks, content and applications.[27]

Furthermore, I have been told in official bilateral negotiations with foreign governments, as well as by global ministers of communications, regulators and international business executives in more informal settings, that the FCC's efforts to regulate Internet network management have generated thinking throughout the world that more regulation of the Internet ecosystem should be the norm. Recent initiatives in Europe underscore this point.[28] Ironically, the Snowden/NSA matter has also fueled international efforts in this regard—as if the problem of government involvement in this area can be cured by even *more* government involvement.

In short, the imposition of Title II regulation on broadband providers will provide cover to less freedom friendly international regimes that wish to subvert the private sector, non-profit and nongovernmental multi-stakeholder model of Internet governance. Regimes seeking to impose extensive economic and social regulations—from regulations on rates and payment flows, to restrictions on speech over the Internet—will find themselves more insulated than ever from criticism. The negative consequences of dramatically increased regulations on a

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[25] *See* Panel On Global Internet Cooperation and Governance Mechanisms, *available at* www.internetgovernancepanel.org.

[26] 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), http://premier.gov.ru/eng/events/news/15601/.

[27] *See, e.g.*, *Proposals for the Work of the Conference*, Algeria, Saudi Arabia, Bahrain, China, United Arab Emirates, Russian Federation, Iraq, Sudan, Contribution 47, at Art. 2 (Dec. 11, 2012), http://www.itu.int/md/S12-WCIT12-C-0047/en (advocating changes to basic definitions contained in treaty text so the ITU would have unrestricted jurisdiction over the Internet); *Contribution from Iran*, The Islamic Republic of Iran, CWG-WCIT12 Contribution 48, Attachment 2 (2011), http://www.itu.int/md/T09-CWG.WCIT12- C-0048/en (arguing that the ITU's rules define "telecommunications" to include "processing" or computer functions).

[28] *See, e.g.*, Case C-131/12, *Google Inc. v. Agencia Española de Protección de Datos* (E.C.R. 2014) (European High Court's ruling on the "right to be forgotten"); *European Single Market for Electronic Communications*, COM (2013) 0627 – C7-0267/2013 – 2013/0309(COD) A7-0190/2014 (European Union's Net Neutrality proposal).

global level would hit American tech companies, which operate in numerous countries around the world, particularly hard as the door opens to a new "sending party pays" construct where American content and application companies subsidize state-owned phone companies across the globe.[29] Any decision to regulate broadband like traditional telephone services would, without question, damage the global Internet economy—to the detriment of consumers and American tech companies worldwide.

[29] *See, e.g., 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), http://www.itu.int/md/T09-CWG.WCIT12-C-0109/en. (advocating application of a sending party pays principle).

The Honorable Ron Johnson

1. What will be the tax implications of applying Title II to broadband providers? What new costs will consumers see on their monthly bills if the FCC moves forward with its proposed Title II approach?

   Thank you, Senator, for raising this important concern. Title II classification will undoubtedly result in increased costs for broadband providers and end-users and run the risk of increased taxes for other Internet service offerings as well. The regulatory burdens resulting from Title II classification are substantial and include, in part: the regulation of rates, terms, and conditions; non-discrimination requirements (which, in fact *allow* reasonable pricing discrimination); entry and exit regulations; confidentiality requirements, audits, and privacy restrictions.

   As I noted in my testimony, the Progressive Policy Institute has estimated that Title II regulation of broadband could lead to substantial state and local regulations, taxes, and fees costing consumers $11 billion a year.[30] These costs, of course, would come "on top of the adverse impact on consumers of less investment and slower innovation that would result" from Title II.[31]

   Additionally, if the FCC follows through with classifying broadband as a telecommunications service under Title II, broadband providers will be required to contribute to federal and state universal service funds. These taxes and fees will be passed on to consumers, and every broadband customer in America will see an increase in their bills. While large providers will no doubt feel the impact of increased costs associated with Title II, small providers with fewer resources will be hit particularly hard. In short, Title II will result in an Internet "tax."

   Resulting legal fees incurred to comply with and combat the new regime will also raise costs for providers—and thus consumers. As I mentioned in my testimony, the only group that stands to benefit from Title II classification are lawyers. Because Title II compliance is complicated, most broadband providers will need to hire experienced attorneys to help them navigate the Title II regulatory maze. That's great for Washington, D.C. lawyers, but a needless drag on American innovation.

   It would be naïve to assume higher taxes, fees, and legal costs will not find their way to consumers' monthly bills. Thus, at the end of the day, it is the end-user consumer that will suffer due to the FCC's experiment with Title II.

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[30] Robert Litan and Hal Singer, *Outdated Regulations Will Make Consumers Pay More for Broadband*, Progressive Policy Institute, at 1 (Dec. 1, 2014). Note that the Progressive Policy Institute issued a correction on its initial assessments—revising its estimate for costs and fees down from $15 billion to $11 billion. Hal Singer and Robert Litan, *No Guarantees When it Comes to Telecom Fees*, The Progressive Policy Institute (Dec. 16, 2014), *available at* http://www.progressivepolicy.org/ issues/economy/no-guarantees-when-it-comes-to-telecom-fees/.

[31] *Id.*

2. For comparison, would the bill Senator Thune has circulated result in any new taxes on consumers?

   No.

3. How easy will it be for the FCC to forbear from onerous provisions of Title II? I have heard many say that the FCC could apply Title II but forbear from all of the outdated provisions. On the other hand, Consumer Watchdog recently told the FCC that Sections 214, 225, 254, 255, 217, 222, 230, 258, 224, 253, 251, 256, and 257 should be applied to broadband providers to "ensure vital consumer protections are in place as [the FCC] strive[s] to ensure 'net neutrality'". It appears that there isn't a whole lot of agreement on what we should forbear from. Is there a concern that either the FCC will not adequately forbear or that any forbearance will be challenged in court (by groups like Consumer Watchdog)?

   Thank you for your question, Senator.

   It will not be easy, as many claim, for the FCC to forbear from the onerous provisions of Title II because the FCC has turned the Section 10 forbearance process into a lengthy, burdensome, and data-intensive ordeal in recent years. Under Section 10 of the Communications Act, the FCC is required to forbear if: "(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest."[32] Historically, forbearance proceedings have involved narrow questions of law. They operate much like an adjudicatory proceeding and require large amounts of evidence for every regulation question. The FCC puts the "burden" of persuasion and production on the proponent of forbearance;[33] if the proponent fails to carry one of its burdens, the FCC can simply deny forbearance. Any similar approach here would increase the risk of large parts of Title II potentially applying. Because of the fact- and data-intensive nature of the inquiry, forbearance proceedings often take 15 months, notwithstanding Congress's direction that the FCC act on forbearance petitions within 12 months.[34] Furthermore, recently the trend at the FCC is for even the most obvious of forbearance petitions to be denied.

   For example, it took the FCC fifteen months to deny forbearance from antiquated accounting rules developed in the 1930s for monopoly-era telephone companies—the Part 32 Uniform

[32] 47 U.S.C. 160(a).

[33] *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, 24 FCC Rcd 9543, ¶ 21 (2009).

[34] 47 U.S.C. § 160(c).

System of Accounts.[35] Instead of demonstrating a continuing need for its Part 32 rules, the FCC denied forbearance because the petitioner had "not demonstrated that Part 32 is not necessary to ensure that charges and practices are just and reasonable, that Part 32 is not necessary for the protection of consumers, and that forbearance from Part 32 would be consistent with the public interest."[36] It took another 17 months of uncertainty to conclude the litigation over the FCC's denial of forbearance.

A more fundamental problem is that the logic of forbearance is incompatible with the FCC's desire to impose Title II on broadband providers to the extent it tries to ground such a decision on the purported market power they enjoy. By contrast, to justify forbearance under Section 10 of the Act, the Commission would have to find that enforcing certain provisions of Title II is not necessary to ensure just and reasonable rates or to protect consumers. There is obvious tension between finding (i) that broadband providers have market power to justify Title II regulation but (ii) that certain Title II requirements are unnecessary to constrain such market power. As I said in my testimony, trying to forbear from applying most of Title II's approximately 1,000 heavy-handed requirements while selecting only a few, as some have proposed, including Chairman Wheeler, involves picking and choosing between who gets regulated and who does not, which will look arbitrary and politically-driven to an appellate court.

The assumption that forbearance can mitigate the draconian impact of Title II is also mistaken. As the Commission previously told Congress, classifying broadband under Title II "would effectively impose a presumption in favor of Title II regulation of such providers. Such a presumption would be inconsistent with the deregulatory and procompetitive goals of the 1996 Act. In addition, uncertainty about whether the Commission would forbear from applying specific provisions could chill innovation."[37]

You are correct that there is not agreement—even among net neutrality proponents—on which Title II provisions should be subject to forbearance. Some of the most restrictive provisions of Title II are those embraced by the proponents of Title II classification as essential to their cause.[38] FCC decisions granting forbearance are often challenged in court,

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[35] *Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, Memorandum Opinion and Order and Report and Order and Further Notice of Proposed Rulemaking and Second Further Notice of Proposed Rulemaking, 28 FCC Rcd 7627, ¶¶ 56-77 (2013), *aff'd*, *Verizon & AT&T v. FCC*, 770 F.3d 961 (D.C. Cir. 2014).

[36] *Id.* ¶ 59.

[37] *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11830, ¶ 47 (1998).

[38] Comments of Public Knowledge et al. at 88-89, GN Docket No. 14-28 (July 14, 2014) (arguing that "the Commission should not simply forbear from . . . Commission authority over interconnection and shut down of service (Sections 251(a), 256, and portions of 214(c)), discretionary authority to compel production of information (Sections 211, 213, 215, and 218-20), provisions which provide explicit power for the Commission to hold parties accountable and prescribe adequate remedies (Sections 205-07, 209, 212, and 216), provisions designed to protect consumers (Sections 203 and 222), or provisions designed to ensure affordable deployment and the benefits of broadband access to all Americans (Sections 214(e), 225, 254, 255, and 257). These statutes are in addition to the

and net neutrality proponents will inevitably sue to stop the FCC from forbearing from any provisions of Title II that they deem essential to maintaining an open Internet. For example, net neutrality proponents challenged the FCC's 2010 *Open Internet Order* because they believed the FCC did not go far enough in regulating wireless broadband.[39] Any decision by the FCC to forbear from Title II will be challenged in court, and, as the Commission previously told the Supreme Court, "[f]orbearance proceedings would be time-consuming and hotly contested and would assuredly lead to new rounds of litigation, and there is no way to predict in advance the ultimate outcome of such proceedings."[40]

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bare minimum recognized in Section 332(c) as the minimum needed to protect consumers—Sections 201, 202, and 208.").

[39] *See Free Press v. FCC*, No. 11-1411 (D.C. Cir. filed Oct. 25, 2011).

[40] Petition for Writ of Certiorari, U.S. Dept. of Justice and FCC, *FCC v. Brand X Internet Servs.*, No. 04-277, at 25, 2004 WL 1943678 (Aug. 27, 2004) (internal citations omitted).