Chairman John Thune
Written Questions for the Record to
Commissioner Jessica Rosenworcel
"Oversight of the Federal Communications Commission"
Senate Committee on Commerce, Science, and Transportation

Question 1: Under the reasoning adopted in the Open Internet Order, should a dial-up Internet service provider (ISP) also be classified as a common carrier? Does a dial-up ISP perform any functions different than, or in addition to, those the FCC attributes to a BIAS provider that would enable the FCC to classify the dial-up ISP as an information service provider? If so, what are those functions? Do you think classification of a dial-up ISP as a common carrier was something that anyone anticipated in 1996?

The Open Internet Order limits its scope to "broadband Internet access service" which excludes dial-up Internet service. *See Open Internet Order*, FCC 15-24, ¶ 187, n.456. This exclusion was initially adopted in 2010. At that time, the Commission determined that dial-up Internet access service should be excluded from the definition of broadband Internet access service for three primary reasons. First, Title II regulations already apply to the telephone connections that dial-up subscribers use to access dial-up services. Second, the market for dial-up Internet access services did not present the same concerns as the market for broadband Internet access. Namely, "telephone service has historically provided the easy ability to switch among competing dial-up Internet access services." *2010 Open Internet Order*, 25 FCC Rcd 17905, 17935, ¶ 51. And third, due to the slow speeds of dial-up, many of the Internet applications and services—such as streaming video—that may be the most susceptible to discriminatory conduct, are unavailable as a practical matter over dial-up. *See 2009 Open Internet Notice of Proposed Rulemaking*, 24 FCC Rcd 13064, 13101, ¶ 91, n.209, cited in *2010 Open Internet Order* at n.161. As such, the Open Internet Order does not address the regulatory classification of dial-up Internet access service. For these reasons, I believe the exclusion of dial-up Internet service from the definition of broadband Internet access service makes sense.

Question 2: Under the Computer Inquiry rules, the FCC determined that the transmission component of wireline broadband service was limited to a connection between the customer and the ISP, and did not include any connections between the ISP and the rest of the Internet. How does the FCC justify adopting a more expansive classification in the Open Internet Order, which includes every ISPs' connection with the rest of the Internet as a subsidiary part of the common carrier service sold to the end user?

Broadband service—as it is offered today—did not exist at the time the FCC's Computer Inquiry regime was put in place back in 1985. The Computer Inquiry rules distinguished between (1) "basic" services, which were subject to common carrier regulation; and (2) "enhanced" services which were not. *See Amendment of Section 64.702 of the Comm'n's Rules & Regs*, Final Decision, 77 F.C.C. 2d 384, ¶¶ 115-23 (1980) ("*Computer II*"). This distinction was effectively codified by Congress in the definitions of "telecommunications service" and "information service" in the Telecommunications Act of 1996. In *Brand X*, the Supreme Court held that those statutory terms were ambiguous with respect to their application to cable modem

service and that the Commission is entitled to deference. *Nat'l Cable & Telcomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 986-1000 (2005).

In the Open Internet Order, the Commission exercised its authority, consistent with *Brand X*, to interpret the statutory terms "telecommunications service" and "information service" based on the current facts in the record about broadband Internet access service. The Commission also found that "disputes involving a provider of broadband Internet access service regarding Internet traffic exchange arrangements that interfere with the delivery of a broadband Internet access service end user's traffic are subject to our authority under Title II of the Act." *Open Internet Order*, ¶ 204. For this reason, the Commission found that the definition of broadband Internet access service "includes the exchange of Internet traffic by an edge provider or an intermediary with the broadband provider's network." *Open Internet Order*, ¶ 195.

Question 3: The definition of "information service" was based largely on the definition that applied to the Bell Operating Companies under the Modified Final Judgment (MFJ) following divestiture. In United States v. Western Elec. Co., 673 F. Supp. 525, 587-97 (D.D.C. 1987), aff'd in part, rev'd in part, 900 F.2d 283 (D.C. Cir. 1990), the MFJ court determined that gateway services constituted information services "under any fair reading" of the definition. How would you distinguish Internet access service as offered today from those services that the MFJ found to fall unambiguously within the definition of Internet access?

The Open Internet Order is limited in scope to broadband Internet access service, and I cannot speculate as to how they compare to the gateway services the MFJ court examined. Consistent with Supreme Court precedent in *Brand X*, in the Open Internet Order, the Commission interprets and applies today's law, the Telecommunications Act of 1996, to today's service—broadband Internet access service. The Supreme Court in *Brand X* held that the telecommunications and information service definitions were ambiguous as to the provision of cable modem service and that the Commission is entitled to deference in its interpretation of the terms. *Nat'l Cable & Telcomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 986-1000 (2005). In the Open Internet Order, the Commission exercised its authority to interpret ambiguous terms in the statute and found, based on the record, that broadband Internet access service as it is offered today is best understood as a telecommunications service.

Question 4: The FCC and state utility commissioners long ago recognized that, if utility-style regulation applies to Internet access service, "it would be difficult to devise a sustainable rationale under which all . . . information services did not fall into the telecommunications service category."[1] Do you agree with that previous Commission finding?

[1] Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd 11,501, ¶ 57 (1998).

The finding quoted above was made in a report to Congress, referred to as the *Stevens Report*, which primarily concerned the implementation of universal service mandates and was not a Commission Order classifying Internet access services. In addition, when the *Stevens Report* was issued back in 1998, broadband Internet access service was at "'an early stage of deployment to residential customers' and constituted a tiny fraction of all Internet connections." *Open Internet Order*, ¶ 315 quoting *Stevens Report*, ¶ 91. And further, the *Stevens Report* reserved judgment on whether entities that provided Internet access over their own network facilities were offering a separate telecommunications service. It notes that "the question may not always be straightforward whether, on the one hand, an entity is providing a single information service with communications and computing components, or, on the other hand, is providing two distinct services, one of which is a telecommunications service." *Open Internet Order*, ¶ 315 quoting *Stevens Report*, ¶ 60.

Therefore, based on record evidence on the manner in which broadband Internet access service is offered today, the Commission, including myself, has concluded that it is best understood as a telecommunications service. The Order does not reach the classification of any other service. *Open Internet Order*, ¶418.

Question 5: Under the FCC's Open Internet Order rationale, why are the services provided by content distribution networks (CDNs) not classified as telecommunications services? Do they not just transmit information? How are the information processing, retrieval and storage functions of CDN services different from the information functions that are provided as part of broadband Internet access services?

The Open Internet Order limits its scope to broadband Internet access service, and this does not include content delivery networks or CDNs. As the Order explained, the Commission has historically distinguished CDN services from "mass market" broadband services because they "do not provide the capability to transmit data to and receive data from all or substantially all Internet endpoints." *Open Internet Order*, ¶ 340.

Senator Dean Heller
Written Questions for the Record to
Commissioner Jessica Rosenworcel
"Oversight of the Federal Communications Commission"
Senate Committee on Commerce, Science, and Transportation

Question 1: I believe that FCC Process reform is long overdue. Do you believe that we can make simple changes to the rulemaking process at the FCC that would create more transparency? Do you believe that we should codify the rulemaking process? Do you believe a proposed rule or amendment to a rule should be published for at least 21 days? If you do not believe that we should publish a proposed rule or amendment for at least 21 days do you believe it should be published before the vote at all?

I believe any agency or arm of the government can find ways to act with greater speed, efficiency, and transparency. The Commission is no exception. That is why I support efforts to examine and improve the Commission's rulemaking practices and procedures.

Specifically, I support efforts to clarify our rulemaking process. But I believe that it is essential that any changes made are compliant with both the Communications Act and the Administrative Procedure Act. Moreover, it is important that efforts to improve our rulemaking practices do not increase red tape or bureaucracy. That is because I believe the agency needs to be nimble in a fast-moving and dynamic communications marketplace.

As a general matter, I believe the Commission should make available proposed rule text in its Notices of Proposed Rulemaking when initiating a proceeding that could lead to significant changes to agency policies. Moreover, I believe under normal circumstances this text should be made available at least 21 days in advance of a decision on final rules.

Question 2: Would you please propose one regulation that we should eliminate?

It is time to eliminate the ORBIT Act report. This report, which the Commission is required to file with Congress annual basis, is no longer necessary in light of the successful privatization of Intelsat and Inmarsat that occurred more than a decade ago. By eliminating this requirement, Congress can free up resources that are necessary to produce this document and allow the agency to dedicate them to more current matters.

Senator Deb Fischer
Written Questions for the Record to
Commissioner Jessica Rosenworcel
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Senate Committee on Commerce, Science, and Transportation

Question 1: All Commissioners, over 40 members of the Senate signed a letter to the FCC last year seeking a way for rate-of-return carriers to receive USF support for broadband-only subscribers. When will the FCC make this bipartisan priority a reality?

In Section 254 of the Telecommunications Act of 1996, Congress defined universal service as "an evolving level of telecommunications service." In addition, Congress charged the Commission with "periodically" updating this definition, while "taking into account advances in telecommunications and information technologies and services."

To this end, it is important that the Commission recognize that an increasing number of households are subscribing to broadband service without also subscribing to traditional voice telephony. This is true in both urban and rural communities. As a result, I think the time is right to develop policies that grant rate-of-return carriers serving rural areas the flexibility to receive support for broadband-only subscribers. I would like the Commission to complete a proceeding on this matter as soon as possible and no later than the end of this year.

Question 2: All Commissioners, what effect does reclassification have on the costs that cable ISPs will have to pay to attach their wires to utility poles and what will this change mean for my rural constituents that are cable broadband customers?

In the February 26, 2015 Order *Protecting and Promoting the Open Internet*, the Commission stated that it was "committed to avoiding an outcome in which entities misinterpret today's decision as an excuse to increase pole attachment rates of cable operators providing broadband Internet access service." The Commission also stated that such increases would be "unacceptable as a policy matter," and the agency committed to monitoring the marketplace for any such changes.

To this end, on May 6, 2015, the Commission's Wireline Competition Bureau released a Public Notice seeking to refresh the record on a petition filed by a number of parties, including some in the cable industry. The petition specifically requests that the Commission examine the cost allocators used in the calculation of the telecommunications rate for pole attachments in order to minimize the difference between rates paid by telecommunications providers and cable operators. I look forward to reviewing the record in response to this Public Notice.