Senator Deb Fischer
Written Questions for the Record to
Mr. Gene Kimmelman
"Protecting the Internet and Consumers through Congressional Action"
Senate Committee on Commerce, Science, and Transportation
Wednesday, January 21, 2015

Question 1 – 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.

Answer:

Public Knowledge has consistently supported the idea that there are basic, fundamental values of communications networks that must be preserved under Internet protocol (IP) networks[1], including protecting Universal Service, competition and interconnection of providers, and basic consumer protections such as privacy and truth-in-billing

[1] https://www.publicknowledge.org/news-blog/blogs/five-fundamentals-for-the-phone-network-transition

practices. Whatever the classification status that the FCC currently or subsequently applies to broadband and IP networks, these values remain as the baseline expectations of the public under the Communications Act.

I agree that the listed sections of the Communications Act continue to be needed for traditional voice services and potentially for broadband services as well. All of them have been important statutory manifestations of the fundamental values of communications networks and the rules crafted from them have been applied to traditional voice telephone services. However, it is possible that the FCC might find that some of these sections need not apply to broadband in order to preserve the fundamental values when broadband is reclassified under Title II.

In my testimony I highlighted concerns that the Thune draft bill may prevent the FCC ensuring that fundamental values (such as privacy, accessibility for the disabled, universal service, and others) could be protected because the draft bill limits the sort of further proceeding described above. Allowing the FCC such power can reduce regulatory burdens in the future through a transparent, APA-compliant process.

The ongoing FCC proceeding around the transition of the phone network to an all IP network is an appropriate place for the FCC and stakeholders to wrestle with the length of time that such statutes are necessary for voice services. Should the Congress continue with a process to update the Communications Act, Congress will be forced to show how it will maintain the fundamental values of communications networks under an updated or new statutory regime, including maintaining the power of the FCC to enforce such protections.

Question for the Record
Senator Amy Klobuchar
"Protecting the Internet and Consumers Through Legislative Action"
January 21, 2014

Question 1. I have some concerns about transparency and rules governing the points of network interconnections, an area that we should explore more. My concern about a lack of rules or enforcement is not a prediction or hypothetical – it's already happening in the voice networks. For the last five years, we've seen rural communities suffering from persistent call completion problems which arise because we don't have enough visibility or enforcement capability with respect to how calls are flowing across networks. This is just an example of what not understanding or having transparency on a part of a network can mean.

Question 1a. Mr. Kimmelman, without some basic transparency at least at the interconnection between underlying networks, how do we protect consumers and achieve other important policy objectives?

Answer:

I agree that rules governing points of interconnection continue to be important to ensure that networks function properly for all Americans, no matter where they may live or work. Public Knowledge continues to support the bipartisan resolution led by Senators Klobuchar, Fischer, Thune, and others acknowledge the central role of the FCC in resolving rural call completion problems and encouraging the FCC to use its broad authority to address these concerns. Similarly, as networks transition to newer, all-IP networks, the power of the FCC to resolve such issues must be maintained regardless of technological upgrades made to our national communications networks. It does not help consumers to see net neutrality rules applied at the point of the network connecting last mile providers to consumers if the problem simply moves upstream to these interconnection points. I am encouraged that Chairman Wheeler has signaled that he intends to preserve to the FCC's ability to address interconnection concerns beyond the narrower proceeding around net neutrality rules. We believe he has the power to address these concerns under his current statutory authority. If the Congress moves forward with legislation around net neutrality or a Communications Act update, it should preserve the power of FCC to investigate and conduct the necessary rule makings to preserve the end-to-end connectivity of the network for all Americans.

Question for the Record
Senator Brian Schatz
"Protecting the Internet and Consumers Through Legislative Action"
January 21, 2014

Question 1. I believe that the FCC needs to have ongoing, flexible authority over broadband. I am concerned that the draft legislation does not preserve that type of authority. What changes can – or should – be made to the draft that would address this concern?

Answer:

The simplest way to preserve flexible authority at the FCC would be to alter three parts of the draft bill. First, change Section 1 of the draft bill to place the language in Title II of the Communications Act. Second, delete subsection b(1)—labeled "Commission Authority"—in the new section inserted to the Communications Act by Section 1 of the draft bill. Removing this takes away the limitations on FCC rulemaking authority beyond the rules prescribed in the draft bill, giving the FCC flexibility to investigate related topics as technology, business practices, and the market changes. Third, elimination Section 2 of the draft bill which limits the FCC authority under 706 that was upheld by the DC Circuit Court in the Verizon case. These changes will give the FCC the flexibility it needs to fully address open Internet concerns, while not preventing the FCC from protecting other basic consumer protections that I highlighted in my testimony may be in danger from such a narrowly tailored bill.

Question for the Record
Senator Cory Booker
"Protecting the Internet and Consumers through Congressional Action" hearing held on Wednesday, January, 21, 2015

Question 1. One aspect largely absent from the debate on Chairman Thune's proposed neutrality legislation is the issue of interconnection. Interconnection is not covered under current legislation.

Question 1a. Do you believe that interconnection points can be choke points to the Internet highway?

Question 1b. Under the proposed legislation, how would interconnection issues be addressed?

Answer:

Yes, interconnection points can be choke points on the Internet if disputes over interconnection and peering agreements slow or limit traffic across different parts of the network. Consumers lose in this situation, through no fault of their own.

The draft bill does not seem to address interconnection issues since it narrowly creates new rules to protect consumers, but limits the authority of the FCC to go beyond those consumer focused rules. I believe the agency already has the authority to address interconnection under Title II of the Communications Act, but Congress could reaffirm this by placing these rules under Title II and then removing the restrictions against other regulatory action in the draft bill.

Question 2. Students, health care providers, and entrepreneurs have benefited greatly from innovative online platforms and the free flow of information. I fear that, without strong net neutrality rules, a "tiered Internet" could emerge, creating barriers for innovators and small businesses.

Question 2a. In the absence of strong anti-discrimination protections provided under Title II, and without Section 706 authority, what tools does the FCC have to prevent discriminatory practices and differential treatment we all agree should be prohibited?

Answer:

A tiered Internet is not just a real fear in a world without strong net neutrality rules, it is a likely outcome. Some internet service providers have been clear that without net neutrality rules they would like to create business practices that would section off the internet, charging extra fees for the delivery of content and services[2]. We have already seen some instances of discrimination by Internet service providers against potential

[2] https://www.publicknowledge.org/news-blog/blogs/these-rules

competitive services. One example is the concern that Public Knowledge and others raised in connection to AT&T's treatment of Facetime in 2013[3]. Fortunately, Public Knowledge was able to threaten a complaint under the FCC's 2010 open Internet rules, which were still in effect at the time, and AT&T changed its practices.

In the absence of Title II and Section 706 authority the FCC does not have any tools to prevent discriminatory practices and would require Congress to act in order to restore its authority.

Question 3. As currently drafted, what protections does the legislation provide that broadband reclassification would not?

Answer:

The draft bill, as currently drafted, does not provide any protections beyond what rules crafted under a reclassification to Title II would provide.

Question 4. Do you believe, as the draft legislation suggests, the FCC should not be able to claim any authority under Section 706 of the Telecommunications Act of 1996?

Answer:

The FCC has used Section 706 for a number of rulemakings and reforms over the years including its ongoing reform of the Universal Service Program (USF). I would caution against removing the FCC's authority under 706 without addressing possible unintended consequences such as harming these reforms of USF.

Question 5. Recent data shows 96 percent of the population has *at most*, two Internet Service Provider options.

Question 5a. How do you respond to concerns that the current legislative proposal would hamstring the FCC's ability to promote competition in broadband?

Answer:

All stakeholders agree that deploying high-speed broadband services is a capital intensive undertaking. Combined with the increasing consumer expectations and FCC standards for what constitutes broadband[4], many Americans would say that they do not have true competition for broadband services. The FCC has several tools to promote broadband deployment and competition in the marketplace. One is the Universal Service Program which subsidizes deployment in high cost areas, as well as to schools and libraries which

[3] https://www.publicknowledge.org/news-blog/blogs/att-hangout
[4] http://www.fcc.gov/document/fcc-finds-us-broadband-deployment-not-keeping-pace

anchor communities. The FCC is currently looking at another tool; if its authority under Section 706 of the Communications Act can allow it to promote broadband deployment and competition by overturning state prohibitions on community broadband deployment projects in Chattanooga, TN and Wilson, NC. The draft bill as currently constructed could eliminate the power of the FCC to act in these cases and extend the competition that the Chattanooga and Wilson projects are already successfully providing to surrounding communities. Given the enormous cost and risk involved in deploying high-speed broadband, we should not limit the ways in which communities can choose to ensure their residents are connected to the market. These projects are critical economic development opportunities for many communities when carefully planned and created with community support and input.

Sen. Tom Udall
Senate Committee on Commerce, Science, and Transportation
Questions for the record
"Protecting the Internet and Consumers through Congressional Action"
January 21, 2015

Questions for the record

Question 1. Mr. Kimmelman, debate over the FCC's authority to issue net neutrality rules also raise the broader question of what the role of the FCC should be in the new broadband era. Last year, for example, the FCC adopted a set of governing principles for the phone-to-broadband transition. Those core values include Public Safety, Universal Service, Competition, and Consumer Protection. Can you share your thoughts about how legislation limiting the FCC's authority over broadband matters could potentially undermine the agency's ability to ensure those core values for our communications systems in the future?

Answer:

The FCC is currently undergoing a process of managing the transition of the traditional phone networks to 21st Century, all Internet protocol networks through its open proceeding on the tech transition. This transition is happening right now in the market and is good for consumers, but the FCC's involvement is critical to make sure that vulnerable consumers are not left behind and these network changes are upgrades for everyone. We agree that the core "network compact" values you cited are an important check list of values that must be maintained in the Communications Act and at the FCC to protect the public interest. The draft bill, as written, would strip the ability for the FCC to manage the tech transition and continue to preserve these core values since many of them reside in Title II or have been justified using Section 706. Reclassification of broadband under Title II simplifies the FCC's work in managing the transition, but it has been able to do so under its current authority in Section 706 as well.

Question 2. Mr. Kimmelman, I would like to ask you to respond to some of the issues raised around crafting rules that reflect the realities for a wireless company managing its network. Last year, FCC Chairman Tom Wheeler wrote to Verizon about his concerns that some features of wireless data plans seem to go beyond reasonable network management practices. Given the draft Thune bill's lack of FCC enforcement authority, does the legislation go far enough to protect Internet openness for wireless users?

Answer:

While the draft bill does include net neutrality rules that cover both wireline and wireless services, there are two weaknesses in the bill around wireless services. First, as we've mentioned before, the bill limits the FCC's rule making authority to the specific net neutrality rules prescribed in the bill. It would not allow the FCC to investigate harms

from future business practices as new technology and business practices change. It freezes the abilities of the agency in time, while technology continues to develop. Second, the draft bill does not prohibit broader discrimination beyond throttling and paid prioritization. Nondiscrimination has always been a core value of network neutrality rules that both throttling and paid prioritization fall under. A broader nondiscrimination rule would allow the FCC to deal with harmful practices that we already concerned about but that don't fall into basic throttling or paid prioritization. These harmful practices include anticompetitive uses of data caps and exemption of a network providers services from such caps.

Questions for the Record
Senator Joe Manchin
"Protecting the Internet and Consumers Through Legislative Action"
January 21, 2014

Question 1. During the hearing, I received conflicting information about how the Chairman's proposed legislation would impact Universal Service Fund (USF) broadband programs like the Connect America Fund (CAF) that help private companies make investments and expand their network into rural, underserved areas. Due to the importance of these programs to my state and the communities I represent, I am requesting a written explanation of the anticipated impacts this bill would have on USF programs from each of the witnesses, specifically:

Question 1a. What authority or authorities does the Federal Communications Commission currently rely on to operate and execute USF programs like the Connect America Fund?

Answer:

In order to include broadband in the services funded through the Universal Service Fund programs, the Commission relied upon Sections 254(e) and 706(b) as independent sources of authority to require carriers to offer broadband in addition to telephony service as a condition for receiving USF support. Support for broadband is currently implemented as a condition on carriers that are also offering Title II telephony service. The Commission's reasoning was upheld by the 10th Circuit but U.S. Cellular has asked the Supreme Court to reverse that holding.

Question 1b. Without either Section 706 of the Telecommunications Act of 1996 authority or Title II of the Communications Act of 1934 authority, as proposed in the draft legislation, under what authority, if any, could the FCC incentivize broadband deployment?

Answer:

Without Section 706, the Commission would be stripped of one of the sources of authority it used to support broadband deployment through the USF. The Commission may still be able to appeal to its Section 254(e) authority to specify what USF recipients may or may not do with USF funds, but that question is still not settled in the courts. Lacking both Title II authority for broadband and Section 706 authority would create serious questions about how the Commission can move forward in administering USF programs. Moreover, if the Commission lacks both Section 706 and Title II authority for broadband, any conversations about adjusting the fund to better support broadband deployment would be stopped in their tracks, and the Commission would lose the ability to be more forward-thinking as a steward of the USF.

Question 1c. What would happen to the Connect America Fund and similar programs should this legislation pass in its current form?

Answer:

The draft bill in its current form would create uncertainty for the Commission's ability to continue administering and improving the ways in which Universal Service programs fund broadband. The draft would strip the FCC of its Section 706 authority, which was an independent source of authority upheld by the 10th Circuit for the Commission's decision to require recipients to deploy broadband. Moreover, if the Commission lost its Section 706 authority and could not classify broadband Internet access services as telecommunications services, it is not clear how the Commission could at some point reshape USF programs to fund broadband services independently. Losing that option as a legal matter stops the policy conversation about the future of universal broadband service in its tracks.

Question 2. One of the primary concerns I have about the proposal we are discussing today is the removal of all rulemaking authority. Businesses need certainty, and rulemaking allows businesses to understand how the general goals and standards Congress establishes in law – such as affordable and accessible Internet – will be specifically applied before they make investment decisions. The proposed bill removes all the transparency requirements included in rulemaking and replaces them with a new, retroactive, case-by-case rulemaking process that could be very difficult for small start-up businesses to understand. Without rulemaking, how would entrepreneurs understand how the FCC would apply the mandates of this bill to particular circumstances?

Answer:

A rulemaking would absolutely provide more certainty than a case-by-case review process. Rulemakings by design provide an agency the flexibility to adapt policy and law to changing circumstances much more quickly and agilely than Congress can. An agency only requires 3 votes to alter a rule that may no longer be working. It is also unclear how an individual case would apply to subsequent cases brought – whether it would have binding precedent, and to what extent.

Question 2a. What opportunities would businesses and consumer groups have to weigh-in on the FCC's application of these rules going forward?

Answer:

There are number of problems with relying on a complaint process alone. First, it is not preventive – you have to wait for the harm to happen – and the party filing the complaint

naturally has to be aware that the harm is happening. This is not always clear to consumers who are often poorly positioned to recognize potential violations. It is also not always clear who has standing to bring a complaint. Finally, even when standing is clear, bringing a complaint is time-consuming and expensive, which most disadvantages the consumers or small businesses the process ostensibly exists to protect most.

Question 2b. How could any changes, however small, even be made to reflect the specific concerns of entrepreneurs or small businesses with the explicit prohibition on expanding Internet openness obligations included in Subsection (b) the draft bill?

Answer:

There is no simple fix – the legislation is fundamentally problematic because it would eliminate the Commission's rulemaking authority. The complaint process is a valuable one but to be effective it really must be connected to an actual rulemaking, not supplant rulemaking. It is also counterproductive to foreclose the expert agency from applying policies to new technologies as the Internet access environment continues to evolve.

Question 3. Do wireless network providers have different network management demands than wireline networks? Please explain.

Answer:

All communications technologies have unique technical qualities that would require unique network management considerations - DSL has network management demands distinct from cable, which is also distinct from satellite, which is distinct from wireless, and so forth. But each of these provides the same fundamental on-ramp to the Internet, and so any public policy considerations on openness and reliable access applies equally to any connectivity technology.

This means that a reasonable network management standard must serve the same underlying policy equally. The best approach for a universal "reasonable network management" practice considers the technical qualities of types of access as well as the fundamental principles it exists to preserve. A clear rule based on fundamental principles can be applied flexibly to any particular access technology. This best addresses reasonable network management for existing technologies as well as any yet unimagined future technologies.

Question 3a. If so, how would wireless service providers be impacted by a universal "reasonable network management" practice that treats all providers the same?

Answer:

All communications technologies have technical qualities that will make them inherently different from any others and that will therefore require their own unique network management considerations - DSL has network management demands distinct from cable, which is also distinct from satellite, which is distinct from wireless, and so forth. But each of these provides the same fundamental on-ramp to the Internet, and so any public policy considerations on openness and reliable access applies equally to any connectivity technology.