Chairman John Thune
Written Questions for the Record to
Commissioner Mignon Clyburn
"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?

Answer: In 2010, the FCC did not extend the Open Internet rules to dial-up Internet access because it concluded that the market and regulatory landscape for dial-up was different from broadband Internet access service. Particularly, the FCC found that:

> We also do not apply these [Open Internet] rules to dial-up Internet access service because telephone service has historically provided the easy ability to switch among competing dial-up Internet access services. Moreover, the underlying dial-up Internet access service is subject to protections under Title II of the Communications Act. The Commission's interpretation of those protections has resulted in a market for dial-up Internet access that does not present the same concerns as the market for broadband Internet access. No commenters suggested extending open Internet rules to dial-up Internet access service.[1]

In *Verizon v FCC*¸ the D.C. Circuit did not disturb the FCC's definition of broadband Internet access including the decision to exclude dial-up Internet access. The 2015 Open Internet Order reaffirms the FCC's 2010 findings and decision.

[1] 2010 Open Internet Order, 25 FCC Rcd at 17932 at 17935, para. 51

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?

Answer: If I understand your question, the Open Internet Order states that the reclassification of broadband Internet access service involves only the transmission component of Internet access service. It also finds that consumers' use of today's Internet to access content and applications is not inextricably intertwined with the underlying transmission component. In my opinion, the main import of the *Computer Inquiries* decisions is that they disprove the claim that the Commission has never before applied Title II to the transmission component of Internet access service. From 1980 to 2005, facilities-based telephone companies were obligated to offer the transmission component of their enhanced service offerings -- including broadband Internet access service offered via digital subscriber line (DSL) -- to unaffiliated enhanced service providers on nondiscriminatory terms and conditions pursuant to tariffs or contracts governed by Title II.

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?

Answer: The Open Internet Order thoroughly explains, in paragraphs 306 to 433, why classifying broadband Internet access service as a telecommunications service is a reasonable interpretation of the Communications Act. The Commission's prior decisions classifying broadband Internet access service as an information service are based largely on a factual record compiled over a decade ago, during its early evolutionary period. As the Open Internet Order makes clear, the factual premises underlying those decisions have changed. Today, it is more reasonable to assert that the "indispensable function" of broadband Internet access service is "the connection link that in turn enables access to the essentially unlimited range of Internet - based services." This is evident from: (1) consumer conduct, which shows that subscribers today rely heavily on third-party services, such as email and social networking sites, even when such services are included as add-ons in the broadband Internet access provider's service; (2) broadband providers' marketing and pricing strategies, which emphasize speed and reliability of transmission separately from and over the extra features of the service packages they offer; and (3) the technical characteristics of broadband Internet access 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."[2] Do you agree with that previous Commission finding?

Answer: Your question refers to a 1998 Report to Congress concerning the implementation of universal service mandates from the Telecommunications Act of 1996. At that time, wireline broadband and DSL services were classified as telecommunications services. Thus, the Report, which is not a binding FCC Order interpreting the statute, was describing the state of Internet access service 17 years ago and it expressly reserved judgment on whether entities, if they provide Internet access over their own network facilities, were offering a separate telecommunications service.

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?

Answer: The 2015 Open Internet Order determined that broadband Internet access service does not include virtual private network (VPN) services, content delivery networks (CDNs), hosting or data storage services, or Internet backbone services, to the extent those services are separate from broadband Internet access service. The Order concluded that such services are distinct from mass market services which the Order defines as "service[s] marketed and sold on a standardized basis to residential customers, small businesses, and other end-user customers such as schools and libraries."

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

Senator Dean Heller
Written Questions for the Record to
Commissioner Mignon Clyburn
"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?

Answer: I am happy to serve as a resource to your Office as you consider reforms that could make the FCC's processes more efficient, transparent, and accessible to the public. I am pleased to report that the Commission has successfully reduced a significant backlog of items before us. The total volume of items pending at the FCC for more than six months has dropped by more than 44% since May 1, 2014. Furthermore, the total volume of licensing-related items pending more than six months at the Commission has dropped by more than 37% since May 1, 2014. Finally, the Commission has seen an over 17% drop in the number of applications for review and petitions for reconsideration pending more than six months since May 1, 2014. The Bureaus and Offices also have achieved significant backlog reductions. For example, the Enforcement Bureau has closed nearly 8,000 cases since April 2013. The Wireless Bureaus has resolved over 2,000 applications older than six months. And the Media Bureau has reduced its pending AFRs by over 50 percent and granted nearly 1,000 license renewals in the fourth quarter of 2014 alone. We share the concern of the Committee that we ensure process reform increases – rather than reduces – efficiencies. I hope that any specific changes to the rulemaking process will not reduce the agency's flexibility to address certain problems in the most efficient manner. I also hope that any statutory changes to the rulemaking process would not impede our ability to deliberate among each other and change initial rule proposals.

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

Answer: It would be helpful if we could eliminate the Sunshine Act rule that prohibits more than two FCC Commissioners from meeting on policy at the same time unless there is a public notice announcing such a meeting.

Senator Roy Blunt
Written Questions for the Record to
Commissioner Mignon Clyburn
"Oversight of the Federal Communications Commission"
Senate Committee on Commerce, Science, and Transportation

Question 1: I fully appreciate your effort to address high rates for phone calls between inmates and their families, friends, lawyers, and clergy.

As I understand it, this issue had been languishing at the FCC for years and it wasn't until 2012, under your leadership as Acting Chairwoman, that the FCC finally issued a Notice of Proposed Rulemaking.

That Notice was approved by the Commission on a bipartisan 5-0 vote. However, when the Report and Order was voted on in 2013, it was approved on a party-line vote.

As Acting Chairwoman at the time, why did this issue lose bipartisan support?

Answer: I was proud of my tenure as Acting Chairwoman to work with my colleagues on a bipartisan basis to tackle a number of items that had been languishing at the Commission. Indeed, we had unanimous, bipartisan decisions on a number of issues including the Notice of Proposed Rulemaking to reform the FCC's E-rate universal service program, an Order to address rural call completion, an Order to reform the FCC's data collection for purposes of the National Broadband Map, and an Order implementing voluntary commitments to resolve the lack of interoperability in the lower 700 MHz band.

On certain issues, my colleagues and I may agree on the goal but not always on the path to achieve the result. As we move forward with additional reforms for inmate calling services, I hope to continue to work with my colleagues for consensus and a solution that complies fully with the obligations under our statute.

Question 2: The National Sheriffs Association, Sheriffs and state associations have presented data and information to show the cost they incur for security and administrative functions necessary to allow inmate calling services in correctional facilities.

Are you considering this information?

How are you working with the Sheriffs to ensure that your rules do not jeopardize security in jails?

Answer:

Yes, we are working with all interested parties, including sheriffs and correctional facilities, to ensure that reforms maintain safe and secure inmate communication. While it is important that reforms comply with the directives of the statute of reasonable rates and fair compensation, it is equally critical that security protocols remain in place.

In February 2014, the FCC's interstate rate caps of $0.21 per debit or prepaid call and $0.25 for collect calls went into effect. Since that time, we have seen tremendously positive results with increased call volumes – as high as 300%. At the same time, I have not heard any concerns that the reforms have had a negative impact on security protocols. This result highlights the ability to achieve meaningful reform while maintaining advanced security protocols.

As we move forward to adopt additional reforms, maintaining this balance is a priority for me. In October 2014, the FCC sought comment on additional reforms to inmate calling services as well as the data submitted by the inmate calling providers in the Second Further Notice of Proposed Rulemaking. Correctional authorities have filed comments and letters in the proceeding and we value their opinions, experiences and expertise. Commission staff is reviewing the record and considering positions from all interested parties.

In addition, Commission staff has met with the National Sheriff's Association, the American Jail Association, regional correctional authorities and sheriffs. The dialogue with correctional authorities is ongoing and we welcome their perspectives and input. My door is always open.

Question 3: The FCC's current proposed rules would extend FCC regulation over the rates charged by inmate calling service providers to inmates for intrastate calls, even though the states regulate intrastate rates.

How do you justify this intrusion into states' rights?

Answer:

In 2013, the FCC's inmate calling reforms were limited to interstate calls and at that time, I asked our state colleagues to follow our lead. Throughout this proceeding, the Commission has highlighted the problems associated with excessive ICS rates and charges and offered to work with states to address intrastate ICS rates and practices. Unfortunately, only a few including Missouri, have instituted reforms. In fact, in other states, we have seen intrastate rates and site commission payments on intrastate calls actually increase.

In the Second Further Notice of Proposed Rulemaking on inmate calling service (ICS), the Commission sought comment on the legal and policy considerations related to possibly reforming interstate and intrastate ICS rates and practices. While the proceeding is pending and no decision has been reached, Congress gave the FCC explicit authority over intrastate calls as well as authority to preempt inconsistent state regulations.

In particular, Section 276 of the Communications Act of 1934, as amended, provides the Commission with authority over payphone service and inmate calling service. With regard to intrastate calls, Section 276(b) directs the FCC to establish a per call compensation plan "for each and every intrastate and interstate call." Moreover, Section 276(c) states that "[t]o the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements." In the Second Further Notice of Proposed Rulemaking, the Commission sought comment on these provisions, the FCC's legal authority and how to harmonize any forthcoming Commission regulations with state rules and regulations, particularly in states that have taken steps to reform ICS in their jurisdictions, such as Missouri. For example, the Commission asked about adopting exemptions to preemption of inconsistent state laws as well as an approach in which states would be responsible for regulating intrastate ICS as long as that regulation is in compliance with the Commission's core principles for ICS.

The Second Further Notice remains pending and we are continuing to analyze the record received and meet with interested parties on the matter on next steps for inmate calling reforms.

Senator Deb Fischer
Written Questions for the Record to
Commissioner Mignon Clyburn
"Oversight of the Federal Communications Commission"
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?

Answer: I reiterate my support to reform the universal service regime for rate of return carriers to address the gap in universal service when consumers want to subscribe only to standalone broadband. The current universal service program lacks the proper incentives to reward carriers for deploying broadband networks and having consumers adopt broadband. The status quo, in fact, penalizes carriers for doing just that by taking away certain universal service support when customers subscribe to standalone broadband. The FCC needs to realign incentives and reward carriers for deploying broadband networks and doing so in an efficient manner.

Last year, the FCC unanimously adopted four principles to guide universal service reforms for rate of return carriers: (1) staying within the existing budget of approximately $2 billion a year; (2) distributing support equitably and efficiently; (3) distributing support based on forward-looking costs; and (4) ensuring that no double recovery occurs. Last month, I spoke to NTCA's legislative conference and reiterated my support for these principles and discussed how to turn these principles into reality in a manner that is predictable and enables carriers to invest and plan.

To truly reach our goal of universal service, however, we need both (1) access to the facilities and (2) access that is affordable. Without both legs in place, the effort will not stand. What is too rarely stated is the fact that the principle of ensuring universal access to low-income consumers shares equal weight in the statute with the principle that high cost, rural and insular areas should have access to reasonably comparable service at reasonably comparable rates to urban areas. Rate of return carriers serve areas that are often less dense and higher cost than urban areas, so the universal service fund plays a pivotal role in the deployment and maintenance of these networks. While carriers, of course, invest their own capital, federal universal service support is critical in closing the gap between investment and return in less dense, rural areas. In addition, universal service is necessary to ensure that the service, once deployed, is affordable for all. So, it is past time to not only reform the high cost program but also to modernize the FCC's only means-tested adoption program to move it from 1985 to 2015 to ensure that consumers in rural areas can afford to adopt broadband. Both pieces are key to ensure that consumers in high cost, rural areas have access to broadband.

While the Chairman determines the timing of items, I remain ready and able to assist in any way to move forward with reforms. I look forward to working with the Chairman and my colleagues on meaningful reforms for consumers served by rate of return carriers.

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?

Answer: The FCC's Open Internet Order removes impediments to broadband competition and deployment by allowing new entrants access to poles. Access to poles, as well as rights of way, are critical for infrastructure build-out and the FCC's reclassification ensures that all broadband providers have the right and ability to access poles. Competition leads to better service and lower prices for consumers.

In terms of the rates paid by cable providers for access to pole attachments, the FCC in the Open Internet Order cautioned that any increases could "undermin[e] the gains the Commission achieved by revising the pole attachment rates paid by telecommunications carriers." The FCC also committed to "monitor[] marketplace developments following this Order and can and will promptly take further action in that regard if warranted."

If you are aware of any instances where cable providers are faced with increases in the cost to access poles, please let me know. I want to ensure that the FCC follows through with its commitment to take swift action if there is evidence that pole attachment rates are increasing.