Chairman John Thune
Written Questions for the Record to
Chairman Tom Wheeler
"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?

Response: The *Open Internet Order* does not address the classification of dial-up Internet access service. The scope of the *Open Internet Order* is Broadband Internet Access Service, which is defined as "a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service."[1] This comes from the definition the Commission adopted in 2010. The *2010 Open Internet Order* noted that the market and regulatory landscape for dial-up Internet access service differed from broadband Internet access service.[2]

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?

Response: Consistent with Supreme Court precedent, the *Open Internet Order* applies the 1996 Act to broadband Internet access service based on record evidence about how that service exists and is offered today. The Commission's Computer Inquiry proceeding drew a line between (1) basic services, which were subject to common carrier regulation; and (2) enhanced services, which were not. The 1996 Act effectively tracked that distinction in its definitions of "telecommunications" and "information" services. The Supreme Court in the *Brand X* case held that those terms are ambiguous with respect to their application to cable modem service and that the Commission is entitled to deference in its interpretation and application of those terms.[3] In

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[1] *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24, para. 25 (rel. Mar. 12, 2015) (*Open Internet Order*).

[2] *Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17932, para. 44, 17935, para. 51 (2010) (*2010 Open Internet Order*), *aff'd in part, vacated and remanded in part sub nom. Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

[3] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-81 (2005) (*Brand X*).

the *Open Internet Order*, the Commission exercised its authority, upheld by the Supreme Court in *Brand X*, to interpret the 1996 Act based on the current facts in the record about how broadband is offered today.

With respect to broadband providers' interconnection (also called Internet traffic exchange) practices, the D.C. Circuit in *Verizon v. FCC* recognized that broadband providers have "gatekeeper" control over the flow of content.[4] Interconnection is simply the operation of the gate. The *Open Internet Order* explains that broadband Internet access service providers' interconnection arrangements are implicit in the provision of retail broadband service that offers consumers access to the entire Internet and, in any event, are provided for and in connection with that service.[5] Thus, the Commission concluded 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."[6]

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?

Response: The *Open Internet Order* properly relies on law and facts that supersede the AT&T Modified Final Judgment, instead applying statutory terms from the 1996 Act to broadband as it exists and is offered today. The Supreme Court in *Brand X* held that the relevant statutory terms were ambiguous as to the provision of cable modem service and that the Commission is entitled to deference in its interpretation and application of those terms. 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 today is best understood as including a telecommunications service offering.

Question 4: On June 8, 2011, NCTA and COMPTEL filed a petition for reconsideration seeking modification of the pole attachment rules to ensure equal treatment of cable operators and telecommunications carriers. Will you commit to ensuring that this petition is resolved before the Open Internet Order takes effect? If not, please explain why the FCC would require more than four years to address this petition.

Response: As I recently told participants at NCTA's Internet & Television Expo, I am committed to ensuring that cable operators do not confront excessive rates for pole attachments. On May 6, 2015, the FCC's Wireline Competition Bureau issued a short public notice to refresh the record on the pending NCTA and COMPTEL petition for reconsideration seeking to bring

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[4] *Verizon*,740 F.3d 623, 646 (D.C. Cir. 2014).
[5] *Open Internet Order* at para. 204.
[6] *Open Internet Order* at para. 204.

cable and telecommunications rates into closer alignment. Once the record is refreshed, my expectation is that a recommendation to the full Commission to bring the rates into as close alignment as the Communications Act allows will be forthcoming.

Question 5: 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."[7] Do you agree with that previous Commission finding?

Response: The statement quoted in your question comes from the 1998 *Stevens Report*, which was a report to Congress concerning the implementation of universal service mandates, and not a binding Commission Order classifying broadband Internet access services. In any event, the Commission did *not* find in the *Stevens Report* that broadband Internet access service—in the form it is offered today—was an information service. When the Commission issued that report, 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.[8] Virtually all households with Internet connections used traditional telephone service to dial-up their Internet Service Provider (ISP), which was typically a separate entity from their telephone company.[9] The *Stevens Report* reserved judgment on whether entities that provided Internet access over their own network facilities were offering a separate telecommunications service.[10] The Commission further noted 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."[11] The *Open Internet Order* concluded, based on a current record, that broadband Internet access service today includes a separable telecommunications service offering.

Question 6: 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?

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[7] Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd 11501, para. 57 (1998).

[8] *See Inquiry Concerning the Deployment of Advanced Telecommunications Services to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398, 2446, para. 91 (1999); Ind. Anal. & Tech. Div., Wireline Comp. Bur., *Trends in Telephone Service*, 2-12, chart 2.10, 16-3, Tbl. 16.1 (Aug. 2008).

[9] *See Stevens Report*, 13 FCC Rcd 11501, 11540, para. 81.

[10] *Stevens Report*, 13 FCC Rcd at 11530, para. 60 ("[T]he matter is more complicated when it comes to offerings by facilities-based providers."), 11535 n.140 ("We express no view in this Report on the applicability of this analysis to cable operators providing Internet access service.").

[11] *Id*., 13 FCC Rcd at 11530, para. 60.

Response: The scope of the Open Internet Order is broadband Internet access services, which do not include content delivery networks (CDNs).[12] As the Order explained, "The Commission has historically distinguished these services from 'mass market' services and, as explained in the *2014 Open Internet NPRM*, they do not provide the capability to transmit data to and receive data from all or substantially all Internet endpoints. [13]

Question 7: The FCC's Fiscal Year 2016 budget submission distinguishes between full time equivalent positions (FTEs) supported by regulatory fees and FTEs supported by auction revenues. What will happen to auction-funded FTEs once the broadcast incentive auction is complete? Because no other substantial auctions are currently expected, will there be a reduction in the number of FTEs supported by auction revenues in the coming years? How many FTEs funded by the Spectrum Auctions Program work primarily in the FCC headquarters at the Portals? Do any FTEs funded by the Spectrum Auctions Program work at other FCC facilities, and if so, how many and at which facilities?

Response: After the broadcast incentive auction is complete, any term spectrum auction funded FTEs to support the broadcast incentive auction will be terminated and the total number of spectrum auction funded FTEs is likely to decrease in number, provided that additional spectrum auction activity is reduced. The total number of Spectrum Auction Program FTEs at September 30, 2014 was 216. Of this number, approximately 201 FTEs worked primarily in the FCC headquarters at the Portals. Approximately 15 FTEs worked at the Gettysburg facility. No other FTEs worked on the Spectrum Auctions Program at any other facility other than the headquarters and Gettysburg locations.

Question 8: The FCC's Fiscal Year 2016 budget submission explains that the Spectrum Auctions Program had nearly $318 million of available cash as of September 30, 2014. How much available cash is projected to be available as of September 30, 2015?

Response: The Commission is projected to have approximately $488 million available at September 30, 2015. These funds will allow the Commission to complete the broadcaster incentive auction and the relocation of broadcasters, which is estimated to start in FY 2016 and end in FY 2019.

Question 9: In its Fiscal Year 2016 budget submission, the FCC projects 1,671 FTEs in FY 2016, a reduction of 37 from FY 2015's 1,708. Please provide the Committee with the number of non-contract FTEs at the FCC for each of the last ten years. Also, please provide the number of contract positions funded by the FCC for each of the last ten years.

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[12] *Open Internet Order* at para. 340.

[13] *Id.* (internal quotation marks omitted).

Response: The total number of non-contract FTEs at the FCC for each of the last ten years and the number of contract positions funded by the FCC for FY 2009 through FY 2015 is listed in the table below. The Commission does not have records to support the number of contract positions funded by the FCC for FY 2006 through FY 2008.

	2006	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**
Total FTEs	1,816	1,793	1,776	1,779	1,775	1,776	1,725	1,723	1,716	1,690
Total Contractors	Not Available	Not Available	Not Available	959	813	576	551	551	501	503

Senator Roger Wicker
Written Questions for the Record to
Chairman Tom Wheeler
"Oversight of the Federal Communications Commission"
Senate Committee on Commerce, Science, and Transportation

Question 1: In the FCC's February 26, 2015 press release announcing its *Open Internet Order*, the Commission indicates that with respect to Section 254 of the Telecommunications Act of 1996 there will be a "partial application of Section 254."

a) Which parts of section 254 will apply and which parts of section 254 will not apply?

Response: In the *Open Internet Order*, the Commission forbore in part from the first sentence of section 254(d) "insofar as [it] would immediately require new universal service contributions associated with broadband Internet access service."[14] The Commission also forbore from sections 254(g) (concerning rates charged by providers of interexchange telecommunications services) and (k) (prohibiting the use of revenues from a non-competitive service to subsidize a service that is subject to competition).

b) What does "partial application" mean?

Response: "Partial application" refers to the fact that the *Open Internet Order* applied much of section 254 to broadband Internet access service, but forbore from the specific requirements described above in response to question 1(a).

c) What effect will the *Open Internet Order* have on the universal service lifeline program?

Response: The *Open Internet Order* applies what the Commission describes as the "policy-making provisions" of section 254 to broadband Internet access service. The Commission found that taking that step would "give us greater flexibility in pursuing" universal service policies relating to broadband Internet access services and would provide "another statutory justification" in support of policies already underway and other goals that the Commission has articulated, such as support for robust, broadband-capable networks in rural America.[15]

d) What effect will the *Open Internet Order* have on the universal service schools and libraries program?

Response: The *Open Internet Order* does not make any changes to the E-rate program. However, as in the *2010 Open Internet Order*, the Commission has provided that the Open Internet rules apply to mass-market broadband Internet access services purchased with the support of the E-rate program.

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[14] *Open Internet Order*, at para. 488.
[15] *Id.* at para 486.

e) What effect will the *Open Internet Order* have on the universal service rural healthcare program?

Response: The *Open Internet Order* does not make any changes to the rural healthcare program. However, in applying the "policy-making provisions" of section 254 to broadband Internet access service, the Commission adopted an approach that would "give us greater flexibility in pursuing" universal service policies relating to broadband Internet access services and would provide "another statutory justification" in support of policies already underway and other goals that the Commission has articulated.[16]

f) What effect will the *Open Internet Order* have on the telecommunications relay service fund?

Response: The *Open Internet Order* applies section 225 of the Communications Act to broadband Internet access services. Among other things, section 225 mandates the availability of interstate and intrastate TRS to the extent possible and in the most efficient manner to individuals in the United States who are deaf, hard of hearing, deaf-blind, and who have speech disabilities. In declining to forbear from section 225, the Commission explained that "[a]s technologies advance, section 225 maintains our ability to ensure that individuals who are deaf, hard of hearing, deaf-blind, and who have speech disabilities can engage in service that is functionally equivalent to the ability of a hearing individuals who do not have speech disabilities to use voice communication services."[17] The Commission forbore, however, from the application of TRS contribution obligations that otherwise would newly apply to broadband Internet access service.

g) What effect will the *Open Internet Order* have on Universal Service Fund support for broadband Internet access service, especially in rural areas?

Response: The *Open Internet Order* does not make any changes to Universal Service Fund support for rural and other high-cost areas. The *Open Internet Order* applies what the Commission describes as the "policy-making provisions" of section 254 to broadband Internet access service. The Commission found that taking that step would "give us greater flexibility in pursuing" universal service policies relating to broadband Internet access services and would provide "another statutory justification" in support of policies already underway and other goals that the Commission has articulated, such as support for robust, broadband-capable networks in rural America.[18]

Question 2: Section 254 (d) provides that "every telecommunications carrier that provides interstate telecommunications services shall contribute... to preserve and advance universal service." The FCC's press release indicates that "the Order DOES NOT require broadband

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[16] *Id.*
[17] *Id*. at para. 468.
[18] *Id* at para. 486.

providers to contribute to the Universal Service Fund under section 254. The question of how best to fund the nation's universal service programs is being considered in a separate, unrelated proceeding that is already underway." [19]

a) What is the Commission's plan for funding universal service now that the FCC has reclassified broadband Internet access service as a telecommunications service?

b) Do you support universal service contributions from providers of broadband Internet access service?

Response - combined response for (a) and (b): The *Open Internet Order* did not alter the Commission's ongoing processes for determining whether and how to reform the universal service contributions mechanism. The Commission has a pending rulemaking regarding contributions reform, and has referred issues relating to contributions reform to the Federal-State Joint Board on universal service. I look forward to considering any recommendations the Joint Board puts forward to address the question of whether broadband Internet access providers should contribute.

[19] https://www.fcc.gov/document/fcc-adopts-strong-sustainable-rules-protect-open-internet

Senator Dean Heller
Written Questions for the Record to
Chairman Tom Wheeler
"Oversight of the Federal Communications Commission"
Senate Committee on Commerce, Science, and Transportation

Question 1: Understanding the complexity of the incentive auction, what is the current timeline for when the incentive auction is expected to take place? Is there any way we can push up the timeline?

Response: The Commission adopted the Incentive Auction Report and Order in May 2014, establishing the basic policies and rules for the auction. Since then, the Commission has moved forward on numerous fronts to address the range of auction implementation issues. We are on track to accept applications in the fall of this year and to conduct the Incentive Auction beginning in the first quarter of 2016. That schedule gives us the time we need to complete work on the auction procedures and related polices, and ensure that the auction software will run seamlessly.

Are there any other spectrum auctions that the FCC is planning on conducting before the authorization runs out in 2022? If so, what are they? At what point in the process are they in? What can I do to be helpful to bring more spectrum to auction?

Response: The Commission is committed to making additional licensed and unlicensed spectrum available for broadband and continues to rely on its auction authority to use market-based mechanisms to accomplish that goal. Auctions are a crucial tool in our tool belt that we have regularly used to make commercial wireless spectrum available to us since the authority was originally granted to us by Congress in 1993.

The Commission has a number of commercial wireless auctions in the pipeline, in addition to the Incentive Auction. We also need to maintain the ability to auction spectrum into the future, including for bands not yet identified, so that when they are identified, we can move as quickly as possible to make the spectrum available in the marketplace.

For instance, in April 2015 the Commission adopted the 3.5 GHz Report and Order, which establishes an innovative three-tiered sharing framework to create a 150-megahertz band of spectrum that, among other innovative spectrum sharing concepts, envisions periodic auctions occurring every three years (3.5 GHz Auctions). In the recurring 3.5 GHz Auctions, up to 70 megahertz will be available on a licensed basis.

In addition, the Commission recently initiated a proceeding to identify spectrum in a number of bands above 24 GHz that could be harnessed for mobile services, including what some refer to as "5G." The Commission sought comment on how these bands could be made available for mobile broadband and other uses, including through auction. The Commission also periodically holds auctions for spectrum that is in our inventory, including spectrum for which there was not a winning bidder in previous auctions.

I appreciate your offer for assistance in identifying additional spectrum that could be made available for auction, and look forward to working with you to achieve our mutual goals.

Question 2: 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?

Response: The FCC rulemaking process is governed by statute through the Administrative Procedure Act.[20] The APA applies to all independent agencies' rulemaking proceedings, and establishes a well-understood, transparent process that has stood the test of time. APA provides for public notice and comment cycles, *ex parte* rules, and reconsideration/appeals – ample opportunity for the public to participate, which enables decisionmaking to proceed in an orderly and fair fashion.

Releasing the text of a draft order in advance of a Commission vote effectively re-opens the comment period and can result in a never-ending proceeding. The APA requires agencies engaged in notice-and-comment rulemaking to consider the comments in the record of a proceeding before reaching a decision. Publicly releasing a draft order before adoption would create the opportunity for additional public comment, which would have to be addressed under the APA. Addressing new round of public comments on matters already fully subject to public comment could result in a new draft order that is substantially different from the original, which in turn could lead to another public comment period (and another if a new draft order were released in response to subsequent public comment). In short, requiring the release of a draft order prior to its adoption could jeopardize the FCC's ability to conclude rulemakings in a timely fashion.

Question 3: Would you please propose one regulation that we should eliminate?

Response: The Report on FCC Process Reform, released on February 14, 2014 after a comprehensive review by a staff working group, recommended several regulations that should be eliminated. Commission staff is working diligently to implement these and other recommendations from the report. Here are a few examples of regulations that the Commission either has recently, or proposes should be, eliminated:

In the last year, the Commission eliminated over 20 rules relating to wireless services in an effort to reduce and minimize regulatory burdens and streamline its rules. Specifically, rules were eliminated to modernize the amateur licensing process, significantly reform and modernize the cellular service rules, and improve and streamline rules and requirements for wireless infrastructure.

[20] 5 USC 551 et seq.

On the media front, last September the Commission repealed its sports blackout rules, which prohibited cable and satellite operators from airing any sports event that had been blacked out on a local broadcast station. That action removed Commission protection of the NFL's private blackout policy, which requires local broadcast stations to black out a game if a team does not sell a certain percentage of tickets to the game at least 72 hours prior to the game. In revisiting the rules, the Commission determined that the rules were no longer justified in light of the significant changes in the sports industry since these rules were first adopted nearly forty years ago.

Last November, the Commission unanimously adopted a Notice of Proposed Rulemaking that would update the contest rules. In the item, the Commission proposed to end the mandate that broadcasters disclose contest information fully and accurately over the air, instead proposing to allow stations to refer consumers to detailed contest information available on a website. We expect to move forward with a rulemaking on this issue this year.

In the equipment certification context, a Notice of Proposed Rulemaking is on circulation now that would propose to eliminate the requirement to file an importation Form 740 for each entry of electronic and communications equipment, which would ease the burden for equipment manufacturers. In addition, the NPRM proposes to combine the Declaration of Conformity and Verification procedures into one self-approval program that is essentially identical to programs used in other parts of the world, streamlining the equipment certification process.

In February 2015, new rules went into effect that eliminated unnecessary international reporting requirements in Part 43 of the Commission's rules. In addition, there is a Further Notice of Proposed Rulemaking pending – which we expect to complete later this year - that proposes to eliminate most or all of the interim design and construction milestone showings currently required of geostationary orbit satellite system licensees.

In an order adopted in October 2014, the Commission eliminated the requirement that 700 MHz public safety licensees narrowband their systems from 12.5 kHz to 6.25 kHz channels by December 31, 2016. The Commission concluded that the narrowbanding requirement was unnecessary because it limited the technical flexibility of licensees to use newer technologies (such as broadband) and would impose unnecessary costs without corresponding benefits. In addition, in an NPRM adopted in April 2015, the Commission proposed to sunset the requirement to transmit 911 calls from non-service initialized (NSI) phones following a six-month transition period. The Commission proposed to sunset the rule because NSI phones are a frequent source of harassing and fraudulent 911 calls and because alternative means of accessing 911 are widely available.

In the last year, the Commission eliminated the technology plan requirement and the prohibition on WAN ownership in the E-rate program. In addition, there is an NPRM currently pending that would propose to eliminate rules from which the Commission has granted unconditional forbearance for all carriers, and also proposes to remove references to "telegraph" from certain sections of the Commission's rules.

Senator Roy Blunt
Written Questions for the Record to
Chairman Tom Wheeler
"Oversight of the Federal Communications Commission"
Senate Committee on Commerce, Science, and Transportation

Question 1: You have held in place broadcast media ownership rules, many of which are decades old - including one that dates back to 1941.

How do you square this with the ownership rules in place for other FCC regulated entities, like cable, satellite and wireless companies?

Response: The Commission issued a Notice of Proposed Rulemaking seeking comment on current media ownership rules. It is important to remember that the Commission has attempted to revisit media ownership rules but they have been remanded on several occasions by the Third Circuit. However, as we review the rules, we are taking steps to increase opportunities for broadcasters and potential new entrants.

One of the first votes I took as Chairman was to approve a Declaratory Ruling to clarify the Commission's policies and procedures for reviewing broadcast transactions involving foreign ownership and investment. The hope is that this will unleash new capital to help existing and future media entities serve the needs and interests of their communities. Another change we have enacted is the enforcement of our existing local ownership rules to close loopholes when we adopted new attribution rules for the use of joint sales agreements (JSAs) for television stations.

Thus, despite the fact broadcast media ownership rules have been in place for a long time, we will continue toreview and adapt our rules where and when it is warranted.

Question 2: In 1991, Congress passed the Telephone Consumer Protection Act (TCPA). The intent of the legislation was to cut down on the growing number of unwanted telemarketing calls interrupting families and consumers at home. At the time, 90 percent of households used a landline telephone, but today technology is changing as more households "cut the cord" and use wireless phones.

Despite the change in technology, TCPA regulations have not kept pace and need to be modernized.

Today, there are numerous petitions that have been pending at the FCC for months, and in many cases for over a year.

The lack of action by the FCC is hurting consumers. For example, as Chairman of the Appropriations Subcommittee on Labor, Health, and Education, I hear from student loan servicers who cannot contact graduates in danger of becoming delinquent on their payments.

This is detrimental to a student's long-term credit, and the problem extends to virtually every business across every sector of the economy.

I'd like to submit for the record a letter to the FCC that was signed by 35 diverse trade associations affected by the outdated TCPA.

Congress did not envision this state of affairs when it enacted TCPA. What is your plan for addressing these pending petitions?

Response: As you note, Congress enacted the TCPA in 1991 to protect consumers from specific unwanted calls. The statute and the Commission's implementing rules prohibit the use of automatic telephone dialing systems and artificial or prerecorded voice messages to make non-emergency calls to wireless numbers and other specified recipients without prior express consent.

Petitions for declaratory ruling now pending before the Commission raise a variety of issues, including what equipment qualifies as an autodialer and how consent from consumers must be obtained to comply with this statutory requirement. The Chairman has circulated a proposal to his fellow commissioners that would resolve more than 20 of these petitions. The Chairman's proposal would provide the clarity that businesses and other callers have requested. The proposal is based on an extensive record in response to the petitions, including numerous informative meetings with trade associations, small business owners, state attorneys general, consumer groups, and other interested parties, including those with debt collection interests that are similar to student loan services.

Please be assured that we have carefully considered the input of all stakeholders, including callers and consumers alike, on the consent requirement and other issues in the Chairman's proposed decision.

Question 3: It's become distressingly normal for the FCC to ignore Congress and obstruct our attempts at oversight.

For example, in 2011, a bipartisan group of 33 senators – including myself – sent a letter to the FCC expressing concerns for a waiver to be granted to a company called LightSquared. The waiver would have been disastrous to Global Positioning System (GPS) technology. The letter had no effect, and the waiver remained on track.
Senator Grassley initiated a formal investigation, and was told by the FCC that the Commission is not obligated to answer to anyone except the Chairman of the Senate Commerce Committee and the Chairman of the House Energy & Commerce Committee.

Mr. Chairman, I don't hold you at fault for the actions of your predecessor, but do you agree that the FCC is unaccountable to 99.6 percent of the Members of Congress?

Answer: Congress maintains the ability to amend our organic statute, pass laws affecting our work and determine our spending levels. Accordingly, the FCC, although specifically designated by Congress as an Independent Regulatory Agency, answers to Congress.

Senator Jerry Moran
Written Questions for the Record to
Chairman Tom Wheeler
"Oversight of the Federal Communications Commission"
Senate Committee on Commerce, Science, and Transportation

Question 1: In 2012 the Department of State, working with the Federal Communications Commission, reached a long anticipated agreement with the Mexican Government regarding spectrum sharing in the 800 MHz band to ensure both countries' operators would be permitted to maximize use of this spectrum band without unnecessary interference. Following the signing of this "Revised Protocol" then-Chairman Genachowski praised the agreement for the public safety and wireless broadband benefits that would result. Unfortunately the Mexican Government has yet to act upon the responsibilities assumed by Mexico in the agreement. As you know, the domestic benefits of this agreement are completely dependent upon Mexican action - and as a result are at a standstill almost three years following the signing of the Protocol.

What is the FCC doing to resolve this international standstill?

Response: While negotiations with Mexico have not progressed as quickly as we would like, the FCC has engaged with our Mexican counterparts since 2012 – including throughout Mexico's telecommunications regulatory reform which took place in 2012-2014 – to realize the benefits of the Revised Protocol. Subsequent to the establishment of Mexico's new regulatory agency the Federal Telecommunications Institute (IFT) in September 2013, FCC staff worked with IFT staff to reestablish relationships with the appropriate contacts and team members responsible for 800 MHz issues in Mexico.

Since 2013, the FCC, in coordination with the State Department, has held several in-person meetings both in Mexico City and in Washington with IFT staff and Commissioners, and video conferences. Since 2014, FCC and IFT staff have worked together diligently on various 800 MHz related policy and legal issues and have held regular task force calls. FCC Chairmen and Commissioners have repeatedly raised the 800 MHz rebanding issue during their meetings with Mexican officials, including the ITU Plenipotentiary in Korea in October 2014 and most recently at the GMSA Mobile World Congress in Barcelona, Spain in March, 2015. The FCC has been waiting for IFT to issue new licenses to incumbent Mexican licensees that need to move out of the portion of the 800 MHz band spectrum that will be used for public safety. During the most recent call with IFT staff on April 28, 2015, IFT staff indicated that they are in the process of finalizing the necessary steps to issue new licenses to authorize the clearing of the 800 MHz band.

How has the FCC coordinated with the Department of State to resolve this issue?

Response: The FCC has coordinated closely with State Department on these issues since the signing of the Revised Protocol with Mexico in 2012. State Department has been invited and has participated in the in-person task force meetings in Mexico City and at the FCC with IFT staff, as well as teleconferences and videoconferences with Mexican counterparts.

When can Congress expect to see progress by the Mexican government to ensure that the hoped-for public and economic benefits are fully realized?

Response: The FCC has been assisting ITF as much as possible, but Mexico does not have an accurate database of its licensees like the FCC does. IFT staff have been collecting data from their licensees and reporting the information to the FCC so that our Transition Administrator can plan the relocation for both countries. While Mexico is making some progress, the FCC has emphasized to IFT the importance of moving forward on this issue as quickly as possible. One of the problems facing Mexico is that it has some government licensees whose relocation is more complex. All incumbent licensees must be issued new licenses in different spectrum before relocation can begin. IFT indicated recently that it is working towards issuing new licenses and taking the necessary steps to clear the 800 MHz band, but has not committed to any specific dates.

Question 2: More than 900 small cable operators across the country rely upon a single buying group, the National Cable Television Cooperative (NCTC), to purchase the programming they offer their customers. Existing law clearly indicates that Congress intended to prevent programmers from charging "buying groups" discriminatory rates. However, due to problems with the manner in which the FCC drafted its rules, the NCTC does not enjoy the protections Congress intended. This problem was brought to the FCC's attention in June of 2012. In October 2012, the FCC issued a rulemaking tentatively concluding that its definition of a "buying group" needs to be modernized to fix this problem and sought comment on this matter. The issue has now been before the FCC for more than two years, and last year the Small Business Administration has urged the FCC to act. What is the status of this proceeding? Does the FCC intend on examining this rule this year? Why or why not?

Response: The Media Bureau continues to evaluate the record in this proceeding, which raises complex legal and policy issues impacting not just small cable operators but also programmers. The Bureau is analyzing the costs and benefits of such a rule change as well as the effect of this proposed rule change on the video marketplace generally. While I understand the concerns raised by the NCTC, nothing is prohibiting the NCTC from qualifying as a buying group under the existing rules, as they previously have done. The companies can create a reserve under the Commission's existing rules and have the protections of Section 628, but have chosen not to. At this time, it appears that these companies are getting agreements, and we are unclear on the need for federal intervention at this time.

Question 3: According to the agency's FY2016 budget request, the FCC has not requested additional full time employees. Can you please describe in detail the composition of the FCC staff by position type? How many attorneys does the FCC employ? How many economists does the FCC employ? How many engineers does the FCC employ? How many administrative staff does the FCC employ? How has that changed over the past 5 years? Please provide detail on other positions that may not be included in the questions above.

Response: The FCC employs 1,686 employees (as of April 18, 2015). The current breakdown of FCC employees by type of positions is as follows:

- 592 Attorneys

- 60 Economists
- 256 Engineers
- 149 in administrative offices/positions
- 629 employees in other occupations, such as analysts, specialists, IT, and accounting/finance positions.

Over the past 5 years, the total number of employees has declined from the FCC's staffing levels in FY 2010 to the present. For comparison, the FY 2010 figures by type of position were as follows:

- 544 Attorneys
- 57 Economists
- 270 Engineers
- 201 in administrative offices/positions
- 760 in other occupations, such as analysts, specialists, IT, and accounting/finance positions.

Question 4: One of the goals of the 2011 Connect America Fund proceeding was to transition universal service support away from voice services to broadband service for unserved Americans. Last year, 130 Members of Congress wrote to the FCC urging progress on universal service updates that are tailored for small companies so they could receive support for offering stand-alone broadband, which consumers are increasingly demanding. I understand that the FCC has sought comment on such updates at least three times now in the last few years. When will the FCC make additional progress in this regard? What more data or information does the FCC need to collect in order to achieve this goal?

Response: Last April, the Commission unanimously proposed a number of key principles for any reform: (a) support amounts must remain within the existing rate-of-return budget; (b) support must be distributed equitably and efficiently; (c) support must be based on forward-looking costs; and (d) no double recovery may occur for broadband costs. We recognize the substantial time, effort, and resources that have been invested in this effort to date, but significant questions remain as to whether the existing proposals fully meet the Commission's principles. While we have made no final decisions to adopt or reject any particular proposals, we do believe that more work can be done to develop a holistic plan that meets the principles set out by the Commission to ensure that high-cost support is distributed in a manner that maximizes public benefits.

In March, my fellow Commissioners and I made a commitment to Senator Thune to reform the USF support mechanisms for rate-of-return carriers by the end of the year. I take that commitment very seriously. I have asked stakeholders in the rate-of-return community for their creative cooperation in getting this job done for rural consumers. I look forward to continuing the work of modernizing the universal service fund high-cost program and to working with stakeholders, including rural carriers and consumers, to ensure that that we are delivering the best possible voice and broadband experiences to rural areas.

Question 5: Describe the role of the FCC's Chief Information Officer (CIO) in the development and oversight of the IT budget for your agency. How is the CIO involved in the decision to make an IT investment, determine its scope, oversee its contract, and oversee continued operation and maintenance? **[**

Response: The FCC's CIO is situated within the Office of Managing Director and works directly with both the Managing Director and the Chief Financial Officer. The CIO provided significant input to determine the FCC's IT investment – which is reflected in the Fiscal Year 2016 budget. All requested programmatic funding increases, apart from the restacking/move of the FCC, are IT-based. We continue to strengthen the IT staff by hiring more experienced personnel, bringing in highly-skilled detailees from other agencies to oversee implementation, and decreasing the number of contractors. The IT department has "intrapreneurs" who work closely with each bureau and office assessing programming in order to (1) prioritize projects according to available funding; and (2) provide the necessary data for budgeting IT projects.

Question 6: Describe the existing authorities, organizational structure, and reporting relationship of the Chief Information Officer. Note and explain any variance from that prescribed in the newly-enacted Federal Information Technology and Acquisition Reform Act of 2014 (FITARA, PL 113-291) for the above.

Response: Although I am aware that OMB still must provide substantial guidance on agency implementation of the Act, the FCC was already moving in the right direction to ensure that our CIO had the support and level of responsibility contemplated by Congress. FITARA mandates a "significant role" in programming, budgeting and decision-making related to IT at their agencies, including approving the IT portion of the annual budget requests agencies submit to Congress. The FCC CIO clearly has this responsibility within the Commission.

The FCC's CIO works directly with the CFO and Managing Director to develop the budget, and he has access to enhanced procurement staff with an IT focus. Specifically, the CIO has implemented a cross-Commission perspective in order to replicate capabilities and reuse applications across the agency - a key component of FITARA. Strategic sourcing and consolidation also are key initiatives. The CIO has demonstrated the use of both of these initiatives in the lift and shift to a federal data center and the use of Software as a Platform in his new initiatives.

In fact, the FCC has an outstanding CIO and we hope that by building his department and strengthening and empowering his staff, we will serve as a role model for IT good governance. In addition, our CIO has a good working relationship with the Federal CIO and is in step with efforts to modernize the approaches to the acquisition and implementation of IT in government.

Question 7: What formal or informal mechanisms exist in your agency to ensure coordination and alignment within the CXO community (i.e., the Chief Information Officer, the Chief Acquisition Officer, the Chief Finance Officer, the Chief Human Capital Officer, and so on)?

Response: Given the compact nature of the FCC, the Office of Managing Director (OMD) coordinates and directs the office's staff, including the CFO and CIO. Also situated under OMD

are human resources and procurement office personnel. The combination of these offices within OMD and the elevated status of the CIO in answering directly to the Managing Director have ensured that the Commission's planning efforts are well coordinated through regular internal contacts.

These support functions also coordinate closely with other parts of the FCC. For example, the CIO conducts regular briefings with the individual Bureau/Office chiefs and deputies to inform them of upcoming IT related upgrades and changes. He also works closely with high level Commission staff to develop systems acquisitions requirements.

Question 8: According to the Office of Personnel Management, 46 percent of the more than 80,000 Federal IT workers are 50 years of age or older, and more than 10 percent are 60 or older. Just four percent of the Federal IT workforce is under 30 years of age. Does your agency have such demographic imbalances? How is it addressing them?

Response: The demographic probably is representative of all of the federal government, but the Commission does not consider an applicant's age when making hiring decisions. The FCC also is proud that its working environment encourages loyal staff and excellent retention of highly qualified personnel. During the past year, the FCC has endeavored to hire and retain qualified, skilled staff regardless of their age, including respected personnel detailed from other agencies. We believe that we need to maintain a fully staffed IT shop and decrease dependency on IT contractors. Until we receive essential funding, however, we will be unable to fully meet needed staffing levels.

Question 9: How much of the agency's budget goes to Demonstration, Modernization, and Enhancement of IT systems as opposed to supporting existing and ongoing programs and infrastructure? How has this changed in the last five years?

Response: The Government Accountability Office has noted that federal agencies currently spend more than 70 percent of their IT budgets on maintaining legacy systems. The FCC, like other agencies, has been caught in this legacy trap; as of the end of FY13, we were trending well above even the federal average of 70 percent. In fact, the FCC has trended as high as 80 percent for Operations and Maintenance (O&M) and this level actually increased during the past five years.

We have tackled the problem of legacy systems head-on and targeted all available resources toward modernizing our IT systems. But we require additional funds to make this a reality, or risk maintaining high-cost, antiquated and inefficient systems. The FCC's Fiscal Year 2016 budget requests $5.8 million to replace the FCC's legacy infrastructure with a managed IT Service provider, as well as one-time infusions of $9.6 million to rewrite the FCC's legacy applications as part of a modular "shift" to a modern, resilient, cloud-based platform. These new funds will be dedicated to removing the legacy restraints imposed on our budget and allow for spending directed toward more economical and useful resources.

Question 10: What are the 10 highest priority IT investment projects that are under development in your agency? Of these, which ones are being developed using an "agile" or incremental approach, such as delivering working functionality in smaller increments and completing initial deployment to end-users in short, six-month time frames?

Response: We have very modest IT investment projects compared to most other agencies and are currently utilizing reprogrammed funds to support a server move. Our FY16 budget outlines the remainder of our specific priorities: $5.8 million to replace the FCC's legacy infrastructure with a managed IT Service provider, as well as one-time infusions of $9.6 million to rewrite the FCC's legacy applications as part of a modular "shift" to a modern, resilient, cloud-based platform. We also have asked for $2.2 million to improve the resiliency of the FCC systems, specifically to address gaps identified in our recent FISMA audit process.

At present, the development of a replacement for our ECFS (or "comments") system is an important example of the continued use of agile development. This project, from start to finish, will take less than six months and uses entirely agile techniques. The ZenDesk deployment took less than 90 days and our new tracking tool will be developed in a similar manner, using either PaaS or SaaS, involving no on-site hardware or software and supported fully in the cloud.

Our move to "O365" is a top-ten priority – but it does not involve development, just moving our Microsoft infrastructure to a true cloud environment. Our highest priority development efforts are mostly centered on incentive auctions and licensing systems. These upgrades are a stop-gap measure until funding is made available for fundamental rewrites of those systems into a true cloud infrastructure, fully utilizing the agile approach

Question 11: To ensure that steady state investments continue to meet agency needs, OMB has a longstanding policy for agencies to annually review, evaluate, and report on their legacy IT infrastructure through Operational Assessments. What Operational Assessments have you conducted and what were the results?

Response: We determined last year that we had 207 legacy systems, mostly unsupportable going forward. As a result, we developed a long-term IT modernization plan that is reflected in our Fiscal Year 2016 budget. Our Fiscal Year 2016 budget requests $5.8 million to replace the FCC's legacy infrastructure with a managed IT Service provider, as well as one-time infusions of $9.6 million to rewrite the FCC's legacy applications as part of a modular "shift" to a modern, resilient, cloud-based platform. A rationalization process for all systems and applications is ongoing as part of our effort to reduce the overall cost and complexity of FCC systems. The initial results reflected almost a 50% reduction in the number of "systems" to be modernized and a significant reduction in active servers.

Question 12: What are the 10 oldest IT systems or infrastructures in your agency? How old are they? Would it be cost-effective to replace them with newer IT investments?

Response: The FCC has identified the legacy system issue as a core impediment to agency efficiency and a major contributor to overpriced maintenance costs. It would be more cost-

effective to replace these systems with newer IT investments and we are moving in this direction. The development of the new Consumer Complaint Database is an example of this work.

I have been advised by our IT staff that examples of our oldest applications include: GenMen, ULS, CDBS, ECFS, ELS, ETFS, EDOCS, EMTS and PAMS. Aging Infrastructure includes: E25K, V490 servers, UPS units in Auctions computer room, Core Routers and the Distribution Switches as well as our SAN. The age of these applications and infrastructure is broad, but mostly falls into the over 10 year range with some probably approaching 20 years.

It is more cost effective to rewrite the applications into a cloud infrastructure versus replacing the equipment. The initial estimate for just modernizing the applications in the way the FCC has been doing business for the past two decades would mean rewriting applications in antiquated code on old platforms in a waterfall approach with an estimate of over $22 million, not including upgrading all of the hardware. Further, that traditional approach is not conducive to short term results through agile development, which significantly reduces our exposure and allows us to adapt quickly to congressional and regulatory requirements. Our request reflects a 50 percent cost avoidance on the development effort alone without even addressing cost avoidance on the hardware.

Question 13: How does your agency's IT governance process allow for your agency to terminate or "off ramp" IT investments that are critically over budget, over schedule, or failing to meet performance goals? Similarly, how does your agency's IT governance process allow for your agency to replace or "on-ramp" new solutions after terminating a failing IT investment?

Response: We are currently in the process of implementing a long-term modernization effort. We do not have issues and problems related to over-budget, over-schedule or related issues due in part to a lack of investment in future needs. Our IT governance process, managed through OMD, allows for a fast turn-around through direct contact and discussion with the CFO and Managing Director. We have a rigorous investment review process for all new development and have instituted a review of all O&M and development efforts.

Question 14: What IT projects has your agency decommissioned in the last year? What are your agency's plans to decommission IT projects this year?

Response: We have not decommissioned any IT projects, but did replace the Consumer Complaints Database system. Because of flat appropriations and not having significant new IT projects funded other than auctions, our entire focus has been on O&M for existing systems. We were compelled to halt improvements and upgrades to the Broadband Map this year due to funding restraints.

Question 15: The newly-enacted Federal Information Technology and Acquisition Reform Act of 2014 (FITARA, PL 113-291) directs CIOs to conduct annual reviews of their agency/department's IT portfolio. Please describe your agency/department's efforts to identify and reduce wasteful, low-value or duplicative information technology (IT) investments as part of these portfolio reviews.

Response: In February 2014, the FCC conducted a top-to-bottom review of its internal processes and determined that IT systems at the agency were in serious need of modernization. Since that time, we have been actively engaged in modernizing the remaining portion of the 207 legacy systems and creating integrated systems similar to the Consumer Complaint Database.

The CIO's recommendations on the IT portfolio review are clearly highlighted in our Fiscal Year 2016 Budget request: $5.8 million to replace the FCC's legacy infrastructure with a managed IT Service provider, as well as one-time infusions of $9.6 million to rewrite the FCC's legacy applications as part of a modular "shift" to a modern, resilient, cloud-based platform. We also have asked for $2.2 million to improve the resiliency of the FCC systems, specifically to address gaps identified in our recent FISMA audit process.

Question 16: In 2011, the Office of Management and Budget (OMB) issued a "Cloud First" policy that required agency Chief Information Officers to implement a cloud-based service whenever there was a secure, reliable, and cost-effective option. How many of the agency/department's IT investments are cloud-based services (Infrastructure as a Service, Platform as a Service, Software as a Service, etc.)? What percentage of the agency/department's overall IT investments are cloud-based services? How has this changed since 2011?

Response: The FCC currently is planning to move to cloud-based system. Beyond the move of Microsoft products to 0365, which is a full cloud-based deployment, lack of funding will limit our ability to re-write our applications in to a cloud infrastructure. We currently have several examples of our ongoing initiative to move systems to the cloud, including: ZenDesk, Relativity, Mule API Manager, box.com, Google Apps for Government, Amazon Web Services, Appian, and CenturyLink for website deployment. We also are planning for several more, including; Azure, SoftLayer, Office365, Incentive Auction, ISAS Bidding system, BPM using ServiceNow and IdaaS using Okta. Please note that these involve only partial deployments in most instances. ZenDesk is a full cloud implementation like O365.

Question 17: Provide short summaries of three recent IT program successes – projects that were delivered on time, within budget, and delivered the promised functionality and benefits to the end user. How does your agency define "success" in IT program management? What "best practices" have emerged and been adopted from these recent IT program successes? What have proven to be the most significant barriers encountered to more common or frequent IT program successes?

Response: Earlier this year, the FCC launched a new Consumer Help Center with a revamped complaint web interface at about $1/6^{th}$ the traditional cost for such a project. This project epitomizes many of the agency-wide changes that we hope to implement for IT: inexpensive, off-the-shelf solutions, combined with resiliency, user-friendly options, and the potential to improve our internal data collection methods to increase transparency and inform policy-making decisions. The roll out of VDI remote access for Commission staff over the last year has made our agency more efficient and allowed for our workforce to be more mobile and office independent. The move to O365 also is a significant project with a fixed price and will be delivered on time and on budget. We also are updating our Electronic Comment Filing System

(ECFS), our 20-year old comments database, which showed strain during the Open Internet proceeding. Completion is targeted within the next month.

Unfortunately, lack of funding has undermined additional system development projects. On April 6, 2015, we did sign a contract to move our server off-premises to a secure federal cluster site in West Virginia, and that project is underway. The Commission has made progress on moving to electronic filing and distribution of licenses for most matters, and we would like to develop a process for including the remainder, with sufficient funding.

In addition, OMD is working hard on improving the searchability, navigability and appearance of the FCC's external website; improvements in search functionality should be seen within the next month, if not earlier. Improving usability and appearance has involved input from FCC.gov stakeholders internally and externally. The status of the FCC.gov upgrade project is described in a recent blog post by the FCC's CIO: www.fcc.gov/blog/modernizing-fccgov-website.

Senator Deb Fischer
Written Questions for the Record to
Chairman Tom Wheeler
"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?

Response: Last April, the Commission unanimously proposed a number of key principles for any reform: (a) support amounts must remain within the existing rate-of-return budget; (b) support must be distributed equitably and efficiently; (c) support must be based on forward-looking costs; and (d) no double recovery may occur for broadband costs. We recognize the substantial time, effort, and resources that have been invested in this effort to date, but significant questions remain as to whether the existing proposals fully meet the Commission's principles. While we have made no final decisions to adopt or reject any particular proposals, we do believe that more work can be done to develop a holistic plan that meets the principles set out by the Commission to ensure that high-cost support is distributed in a manner that maximizes public benefits.

In March, my fellow Commissioners and I made a commitment to Senator Thune to reform the USF support mechanisms for rate-of-return carriers by the end of the year. I take that commitment very seriously. I have asked stakeholders in the rate-of-return community for their creative cooperation in getting this job done for rural consumers. I look forward to continuing the work of modernizing the universal service fund high-cost program and to working with stakeholders, including rural carriers and consumers, to ensure that that we are delivering the best possible voice and broadband experiences to rural areas.

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?

Response: The *Open Internet Order* applies section 224 of the Communications Act to broadband Internet access services, and in so doing ensures that companies providing broadband Internet access service – but not previously entitled to the protections of section 224 – will have access to utility poles at reasonable rates. With respect to the regulated rates at which cable companies are able to attach their wires to utility poles, as I recently told participants at NCTA's Internet & Television Expo, I am committed to ensuring that cable operators do not confront excessive rates for pole attachments. On May 6, 2015, the FCC's Wireline Competition Bureau issued a short public notice to refresh the record on the pending NCTA and COMPTEL petition for reconsideration seeking to bring cable and telecommunications rates into closer alignment. Once the record is refreshed, my expectation is that a recommendation to the full Commission will be forthcoming to bring the rates into as close alignment as the Communications Act allows.

Question 4: Chairman Wheeler, the law defines an "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or

making available information via telecommunications." Why doesn't the plain language of the statute compel a finding that Internet access is, at least primarily, an information service that enables consumers to generate, acquire, store, transform, process, retrieve, utilize or make available information?

Response: The Supreme Court in the *Brand X* case held that the terms telecommunications service and information service are ambiguous with respect to their application to cable modem service and that the Commission is entitled to deference in its interpretation and application of those terms.[21] In the *Open Internet Order*, the Commission exercised its authority, upheld by the Supreme Court in *Brand X*, to interpret these terms based on the current facts in the record. Specifically, based on the substantial record compiled in response to the NPRM, the Commission determined that "providers today market and offer consumers separate services that are best characterized as (1) a broadband Internet access service that is a telecommunications service; and (2) "add-on" applications, content, and services that are generally information services." [22]

Paragraphs 355 through 387 of the *Open Internet Order* provide a thorough analysis as to why the Commission concluded that the broadband Internet access service fits within the statutory definition of a "telecommunications service" rather than an "information service."

Question 5: Chairman Wheeler, I'm concerned that President Obama's new Internet regulations were written in a "one-size-fits-all" way so small cable operators in Nebraska, wireless ISPs across the country, and even municipal broadband networks will be treated similarly to bigger broadband companies. The president's own Small Business Administration even admonished the FCC that its proposed rules would unduly burden small businesses. Was there any concern at the FCC about how President Obama's Open Internet Order will negatively impact small Internet service providers, and why did they get swept up in this 400-page order?

Response: The *Open Internet Order* ensures that all persons who subscribe to broadband Internet access service—regardless of whether they live in a densely-populated city or a very rural area— have the freedom to use the Internet to conduct commerce, communicate, educate, entertain, and engage in the world around them.

In developing carefully-tailored open Internet protections, the Commission carefully considered comments from small ISPs and their representatives. Indeed, it was largely based on the concerns of smaller providers that the Commission declined to adopt certain enhancements to the Open Internet transparency rule that were proposed in the *2014 Open Internet NPRM* – such as a requirement to disclose the source of congestion, packet corruption, and jitter. In addition, the Commission granted a temporary exemption to small ISPs (defined for this purpose as those with 100,000 or fewer subscribers) from all enhancements to the transparency rule, and it directed the Commission's Consumer & Governmental Affairs Bureau to determine whether to maintain that

[21] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-81 (2005) (*Brand X*).

[22] *Open Internet Order*, at para. 341

exemption and at what threshold by December 15, 2015. More generally, the Commission can and does grant waivers where a small entity cannot bear a burden appropriate to larger entities.[23]

Question 6: Chairman Wheeler, why didn't the FCC offer more APA notice and comment on Title II prior to the president's YouTube video?

Response: The Notice of Proposed Rulemaking issued by the Commission in May 2014 expressly identified and sought comment on the potential reclassification of broadband Internet access service. During the extended comment cycle—of over 100 days—parties had more than sufficient opportunity to comment, and nearly four million comments were filed. As the *Open Internet Order* stated, the approach adopted by the Commission "is one that the NPRM expressly identified as an alternative course of action. It is one on which the Commission sought comment in almost every section of the NPRM. It is one that several broadband Internet access service providers vigorously opposed in their comments in light of their own reading of the NPRM."[24] The Commission provided ample notice of the approach that we adopted in the final order, in full compliance with our legal obligations under the Administrative Procedures Act.

Question 7: Chairman Wheeler, does the FCC's reclassification decision mean that the FTC no longer has jurisdiction over the privacy activities of broadband providers? Because of the reclassification decision, are we about to lose the FTC's expertise when it comes to ISPs' privacy practices?

Response: I believe this question refers to the so-called "common carrier" exception that Congress included in the FTC Act. The FCC is not expert in, or in a position to comment on, the FTC's jurisdiction. That said, the FCC has substantial expertise and experience in protecting the privacy of customers of communications networks, and is committed to bringing that expertise and experience to bear in the context of broadband Internet access services. In addition, the FCC has a close working relationship with the FTC, and looks forward to continued collaboration on many matters.

Question 8: Chairman Wheeler, can you explain how the FCC can preempt state governance of municipal broadband when the Supreme Court ruled in *Nixon v. Missouri Municipal League* the commission does not have this authority? Specifically, how are the federalism issues different under section 706 and section 253?

Response: In Section 706 of the Telecommunications Act of 1996, Congress directed the Commission to encourage broadband deployment and take immediate action to remove barriers to infrastructure investment and promote competition when advanced broadband is not being deployed to all Americans in a reasonable and timely fashion.

In our February 26, 2015 decision regarding certain state laws in North Carolina and Tennessee, the Commission found that certain statutory provisions in the North Carolina and Tennessee statutes constituted barriers to broadband infrastructure investment and competition, and we

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[23] *Id. at para.* 530 (citing waiver possibility for Title II obligations); *see, e.g., Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 17 FCC Rcd 14841 (2002) (extending compliance deadline for smaller providers only).

[24] *Id* at para. 387.

preempted those provisions pursuant to our authority under section 706. This action was taken in response to petitions for preemption filed by the City of Wilson, North Carolina (Wilson) and the Electric Power Board of Chattanooga, Tennessee (EPB).

The Commission's decision to preempt does not preempt restrictive laws with respect to municipal broadband in other states. However, the decision does establish a precedent for reviewing similar laws in other states, and the *Order* stated that the agency would not hesitate to preempt other, similar state laws if those laws constitute barriers to broadband deployment.

Senator Dan Sullivan
Written Questions for the Record to
Chairman Tom Wheeler
"Oversight of the Federal Communications Commission"
Senate Committee on Commerce, Science, and Transportation

Question 1: Chairman Wheeler, thank you for visiting Alaska last August. Since your visit, the Alaska Telephone Association has authored a plan, the "Consensus Alaska Plan," which would allow them to provide broadband to unserved areas and improve service throughout Alaska. 16 Alaskan companies have signed on to the plan. What are your thoughts on the Consensus Alaska Plan?

Response: The Commission has long recognized the unique challenges of deploying broadband to remote areas of Alaska. We welcome industry input and will consider the plan presented by the Alaskan companies as the Commission considers reforms to the high-cost mechanisms that support voice and broadband service provided by rate-of-return carriers, as well as support for mobile carriers.

Question 2: Chairman Wheeler, in November, President Obama made clear that he believed the FCC should reclassify broadband under Title II of the Telecommunications Act. Soon after, you changed your position on net neutrality, aligning it with the President's position. Please address the legality of a president influencing the actions of an independent agency.

Response: The process the FCC followed to develop the Open Internet Order was the informal rulemaking process established in Section 553 of the Administrative Procedure Act. Interested parties can participate in this process by submitting comments into the rulemaking record or by making *ex parte* presentations to FCC Commissioners and staff. Executive branch officials, including the President, can and do participate in these FCC rulemaking proceedings. The Department of Justice Office of Legal Counsel found in a 1991 opinion requested by the George H.W. Bush Administration that "it is permissible for White House officials to contact FCC Commissioners in an effort to influence the results of an FCC rulemaking," subject to the Commission's disclosure rules.[25]

On November 10, 2014, President Obama issued a video and a written statement calling for the creation of "a new set of rules protecting net neutrality." His statement became part of the Open Internet rulemaking record later the same day, when the National Telecommunications and Information Administration filed the President's statement and a notice of an *ex parte* presentation in the proceeding record. President Obama was one of many commenters – including many Members of Congress – who supported a Title II reclassification approach.

Question 3: In the future, there is the possibility that Congress will attempt to rewrite the Communications Act. The last major overhaul of your original authorizing legislation was the Telecommunications Act of 1996. In that Act, Congress was very clear that expansion of advanced telecommunications services to rural Americans was a priority. The Act established the Universal Service Fund as a way of implementing that priority, stating that congressional

[25] 15 U.S. Op. Off. Legal Counsel 1, 3 (1991).

intent was that funding be "sufficient" to allow infrastructure to be built to remote, sparsely populated areas and that the funding be "predictable" so that companies providing the infrastructure can take on necessary debt with a reasonable expectation that they will be able to maintain their debt coverage. Do you agree that the principle of universal service, which has long been a guiding principle of the federal government, should continue to be a priority in any new legislation?

Response: As I have made clear since the day I arrived at the Commission, universal service is one of the core elements of the network compact that exists between the companies that provide the service and the public. Congress has enshrined this value in the Communications Act, and achieving universal service is a goal that must guide the work of the FCC in all that we do. Simply put, access denied is opportunity denied.

Question 4: The FCC is now examining additional ideas for expanding broadband capability in unserved areas. For Alaska, one of the biggest obstacles to closing the broadband availability gap is ensuring that all Alaska service providers have access to middle-mile capability at reasonable rates. Will you commit to work on closing the broadband availability gap in Alaska?

Response: I understand the challenges to providing reasonably comparable broadband to end-users presented by the current middle-mile options in many parts of Alaska. The most remote, highest-cost areas may take longer to reach than other areas, but any long-term solution for Alaska must include addressing the middle-mile capabilities. I am heartened by news that there is some progress by the private sector to upgrade existing middle-mile capabilities and create new ones.