



Hearing on

Protecting the Internet and Consumers through Congressional Action

Before the

Committee on Commerce, Science, and Transportation  
United States Senate

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Testimony of

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Thank you, Chairman Thune and Ranking Member Nelson. My name is Paul Misener, and I am Amazon's Vice President for Global Public Policy. Thank you for your attention to this important topic; for calling this hearing; and for inviting me to testify.

I. INTRODUCTION

Amazon has long supported maintaining the fundamental openness of the Internet, which has been so beneficial to consumers and innovation. We made our first FCC filing in support of the open Internet over twelve years ago, even before the term "net neutrality" was coined. Amazon also has long joined with other parties in support of net neutrality. A decade ago, we were a leading member of a coalition that included dozens of companies, as well as dozens of public interest groups from across the political spectrum. At the time, many policymakers questioned the benefits of Internet openness, and whether such benefits needed to be ensured by government. But now there is widespread acceptance of the need for government action to ensure Internet openness; now policymakers need only decide how to ensure that the Internet openness of net neutrality is maintained and effective. Amazon

currently supports net neutrality through the Internet Association, as well as directly and through other organizations.

At Amazon, our consistent business practice is to start with customers and work backwards. That is, we begin projects by determining what customers want and how we can innovate for them. Here, in the context of net neutrality public policy, we have done the same: we take our position from our customers' – consumers' – point of view.

Consumers want to keep the fundamental openness of the Internet and the choice it provides. After two decades of the World Wide Web, it's no longer a novelty: Consumers have come to expect and demand openness and choice on the Internet – to demand net neutrality. Consumers also have come to understand that bits are bits; that it shouldn't be any harder or more expensive for their broadband Internet access service provider to deliver one bit over another, and that there's no technical or other inherent reason to discriminate against one bit over another, or prioritize one bit over another.

Consumers will recognize if net neutrality is taken from them. And if their net neutrality is taken, they won't care how or, for example, *where* in the network infrastructure it is taken: If net neutrality is taken at one point in the network, rather than another, consumers won't care. They are results-oriented: At the end of public policy discussions and decisions, consumers ultimately will judge whether Internet openness was ensured – whether they got to keep net neutrality, or whether it was taken away from them.

## II. LEGAL AUTHORITY

Consumers certainly will be results-oriented in their assessment of what particular legal authority the United States Government uses to ensure that net neutrality is maintained: The authority will either work, or it won't. We believe that the FCC has ample existing statutory authority to maintain

net neutrality, and we welcome Chairman Wheeler's attention to this issue and his efforts to use his statutorily-granted authority in a measured, focused way. We would not want discussions of new statutory authority to derail or delay Chairman Wheeler's work but, like he recently has said, we also would welcome additional statutory direction from Congress.

Some telecom lawyers believe the FCC cannot fully maintain historic net neutrality protections employing only the provisions of Section 706 of the Telecommunications Act. Recent litigation suggests they are right. Such lawyers also point out that the FCC could 'un-forebear' the entirety of Title II of the Communications Act for this purpose, and they are right. But some other telecom lawyers believe that if the FCC reinstated *all* of Title II, there would be myriad unintended consequences unrelated to net neutrality. They are probably right, too, and Amazon is focused on strong, enforceable net neutrality protections, so we don't support a complete return to Title II here. We have concluded that reinstating only a few provisions of Title II – particularly all or parts of Sections 201, 202, and 208 – plus relying on other existing statute, including Section 706, would be adequate to maintain net neutrality without creating unintended consequences.

But, of course, these approaches are within the confines of existing statutory authority. Obviously, Congress has the power to set new policies for net neutrality, either entirely through a new statute, or through a mix of new and existing statutory authority.

### III. DISCUSSION DRAFT

Amazon remains very grateful for Congress's continuing attention to net neutrality. The topic certainly is worthy of your vigilant oversight. Thank you also, Mr. Chairman, for creating and sharing your Discussion Draft bill, and for providing me the opportunity to begin discussing it today. I look forward to continuing conversations about net neutrality protections in the coming weeks and months.

The principles of net neutrality contained in the Discussion Draft are excellent: For example, the draft clearly acknowledges that throttling and paid prioritization must be banned; that net neutrality protections must apply to wireless, as well as wireline; and that providers must disclose their practices.

Of course, for these excellent principles of Internet openness to be meaningful to consumers, they need to be effective. In at least three instances, however, the Discussion Draft could be interpreted to undermine that effectiveness, so the bill should be modified accordingly to ensure that the Internet openness of net neutrality is maintained and effective.

First, in Subsection (d), while requiring “Consumer Choice,” the bill would explicitly exempt “specialized services” from that requirement. This could create a huge loophole if, for example, specialized services involved the prioritization of some content and services, just like proscribed “paid prioritization,” the only difference being that the content or service prioritized came from the broadband Internet access service provider itself, instead of a third party.

Subsection (d)(1) reads, “Nothing in this section shall be construed to limit consumer choice of service plans or consumers’ control over their chosen broadband Internet access service....” Hopefully, no one wants to limit actual consumer choice. Indeed, consumer choice is exactly what advocates of net neutrality have been trying to preserve and protect for over a dozen years. But other than the “specialized services” that are explicitly exempted from the consumer choice requirement, it is not obvious what part of the bill might be construed as limiting consumer choice. Almost explicitly, therefore, the bill acknowledges that the provision of such specialized services would defeat consumer choice and the Internet openness of net neutrality, despite the limitations of Subsection (d)(2).

Consumer choice is baked into the Internet. Nothing would protect consumer choice more than protecting the open Internet from interference by broadband Internet access service providers. As I have described in previous testimony before Congress, the Internet is fundamentally different – both in

technical design and practical operation – from other major media, including newspapers, radio broadcasting, satellite TV, and cable. In those media, content is “pushed” out to consumers – and thus fills up the papers, channel, or channels – in the hope that many consumers will want to read, hear, or watch the content. In contrast, Internet consumers “pull” to themselves the content of their choosing, so Internet content does not fill a broadband Internet access provider’s network unless a consumer has pulled it through there. Again, the open Internet is all about consumer choice, so Subsection (d) is unnecessary if this bill otherwise would ensure the Internet openness of net neutrality.

If, contrary to these concerns, the purpose of Subsection (d) is to ensure that consumers are allowed to choose among various, non-discriminatory plans based on bit rates or monthly data volumes, then there are ways to say that more clearly: Something along the lines of, “Nothing in this section should be construed to limit the ability of consumers to choose to pay for higher or lower data rates or volumes of broadband Internet access service based on their individual needs.” We agree that it makes no sense to require an infrequent email user to pay the same for Internet access as a 24/7 gamer and, if such a clarification is needed, we would support it. But the current language of Subsection (d) does not accomplish this goal and introduces the other noted problems.

Second, in Subsection (f), the Discussion Draft bill would permit broadband Internet access providers to engage in “reasonable network management.” This is a standard caveat to net neutrality, and we support it, at least in theory. But particularly with the inclusion of wireless broadband in the ambit of net neutrality protections, any claim of reasonable network management should be viewed very suspiciously if, in practice, it undermines prohibitions of blocking, throttling, paid prioritization, etc., or if it tends to favor content or services offered by the broadband provider itself.

Third, the Discussion Draft bill is unclear or silent on an important point of clarification: Which parts of a broadband Internet access service provider’s network are covered by the net neutrality

protections? As indicated earlier, a consumer will not care *where* in her service provider's network any interference with net neutrality occurs, only *whether* it occurs. Providers should not be allowed to accomplish blocking, throttling, paid prioritization, etc., further upstream in the network, just because the bill could be construed to address only the network facilities closer to consumers, such as the "last mile." If, by this possible omission and limitation of FCC powers, net neutrality were made ineffective by allowing the otherwise prohibited behaviors to occur further upstream, consumers would rightly judge their net neutrality to have been taken away.

In sum, these three areas of the Discussion Draft bill should be modified in order to ensure that the Internet openness of net neutrality is maintained and effective.

In addition, the Discussion Draft should be modified to provide adequate legal detail and certainty to consumers and businesses in the Internet ecosystem. Although the Discussion Draft's net neutrality principles are promising, they also are fairly general. And, although the Discussion Draft would require, in Subsection (a)(5), broadband Internet providers to disclose their practices, these disclosures would merely reflect what providers currently are doing, not what they would be legally permitted to do.

Like all businesses, Internet companies need confidence in the state of law and regulation in order to innovate and invest in products and services on behalf of their customers. They need to know, with a reasonable degree of certainty, whether a new product or service could be deployed without interference by broadband Internet access service providers. Certainty does not require legal certitude, but it does require confidence-inspiring transparency, predictability, stability, and fairness. Yet statutes are necessarily less detailed than agency-written rules. And such details – including the factors that would be considered during formal complaint procedures – are essential for businesses and consumers to have the confidence to make informed choices about investments and purchases.

We believe that the FCC should be empowered to create adequate legal certainty and detail through effective enforcement tools and notice and comment rulemaking. But the Discussion Draft bill would limit the FCC in several ways. Subsection (b) says that the FCC “may not expand ... Internet openness obligations ... beyond the obligations established” in the bill “whether by rulemaking or otherwise.” The word “expand” is vague, but if the intention here is to establish a ceiling for these obligations, *i.e.*, a cap on the FCC’s authority respecting the substantive provisions of the bill, this is Congress’s prerogative and reasonable expectation; we certainly don’t support allowing an agency to act beyond its statutory authority, and would support a provision like this, if the bill went only so far.

However, with such a ceiling in place, it is not necessary to rescind the FCC’s authority under Title II of the Communications Act, as in Subsection (e). Summarily blocking the FCC’s use of existing statutory enforcement authority could leave the agency helpless to address improper behaviors well within its authority under the ceiling created in Subsection (b), and would leave consumers and businesses in the Internet ecosystem without adequate certainty about the FCC’s enforcement powers. With so much at stake for consumers and businesses, this very real possibility should not be left to chance. We believe that the FCC’s Title II authority should be maintained to ensure the effectiveness of Internet openness, subject to any reasonable substantive ceiling on Internet openness obligations.

Also, in part because Subsection (b) directs the FCC to establish “formal complaint procedures” and “enforce the obligations [of the bill] through adjudication of complaints,” this provision could be interpreted to bar the FCC from notice and comment rulemaking in this area. If that is the intent, we oppose it. Directing the FCC not to “expand” statutorily-established obligations is one thing, but we believe it would be a mistake to prohibit the Commission from providing, through notice and comment rulemaking, adequate legal detail and certainty to consumers and businesses. Outlining the parameters around permissible forms of “reasonable network management” is but one example of where the FCC

could provide important detail to consumers and businesses through notice and comment rulemaking. Notice and comment rulemaking also would more readily expose any attempt by the FCC to “expand” the open Internet obligations of the bill, and thus would promote the core purpose of this subsection. And notice and comment rulemaking provides an important avenue for public participation in the work of government agencies; this avenue should not be blocked for net neutrality.

Thus, at a minimum, Subsection (e) should be amended to ensure that the FCC retains its Title II tools, subject to a substantive ceiling on Internet openness obligations, such as included in Subsection (b)(1), which itself should be clarified to allow the FCC to provide, through notice and comment rulemaking, adequate legal detail and certainty to consumers and businesses.

#### IV. CONCLUSION

In conclusion, Mr. Chairman, I look forward to working with you, your committee, and the FCC to ensure that the Internet openness of net neutrality is maintained and effective.

And I welcome your questions.

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