

**CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA**

WILLIAM L. KOVACS
SENIOR VICE PRESIDENT
ENVIRONMENT, TECHNOLOGY &
REGULATORY AFFAIRS

1615 H STREET, N.W.
WASHINGTON, D.C. 20062
(202) 463-5457

July 15, 2014

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28

Dear Ms. Dortch:

The U.S. Chamber of Commerce (“Chamber”)¹ respectfully submits these comments to the Federal Communications Commission (“Commission”) in response to its Notice of Proposed Rulemaking (“NPRM”) in the above-referenced proceeding.²

I. Introduction

The Chamber views broadband as a vital tool for stimulating job growth, fostering economic development, and improving every aspect of our society from education to healthcare. The broadband marketplace is extremely competitive and innovation is thriving. Therefore, the Chamber strongly urges the Commission to reject calls for classifying broadband as a “telecommunications service” under Title II of the Communications Act or regulating broadband providers under any modified form of Title II regulation. Title II broadband regulation would harm private-sector investment in broadband infrastructure, innovation, consumer choice, and job creation. Old monopoly-era telephone rules should not be applied to broadband networks.

II. The Chamber Strongly Opposes Any Form of Title II Broadband Regulation

The NPRM seeks “comment on whether the Commission should rely on its authority under Title II of the Communications Act,³ including both (1) whether [it] should revisit the

¹ The U.S. Chamber of Commerce is the world’s largest business federation, representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America’s free enterprise system.

² Notice of Proposed Rulemaking, *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, (rel. May 15, 2014), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0515/FCC-14-61A1.pdf.

³ 47 U.S.C. §201 *et seq.*

Commission’s classification of broadband Internet access service as an information service and (2) whether [it] should separately identify and classify as a telecommunications service a service that ‘broadband providers . . . furnish to edge providers.’”⁴ The Chamber strongly opposes any form of Title II broadband regulation. Specifically, the Chamber opposes both the classification of broadband Internet connectivity as a “telecommunications service” to which all the requirements of Title II of the Communications Act would apply as well as the imposition of any form of modified Title II regulation on broadband providers.

Title II regulation, which has its origins in 1880s railroad regulation, was originally enacted as part of the Telecommunications Act of 1934 to address potential concerns stemming from having one company as the monopoly provider of “telecommunications services.”⁵ These regulations covered services provided by the “public switched telephone network.” Title II regulated telephone services offered across state lines (e.g., long distance phone calls) and later was modified to regulate certain practices of the Regional Bell Operating Companies that were created in the wake of the AT&T divestiture.⁶

Traditional wireline telephony is on the decline; it comprised just 21.7 percent of the 443 million phone lines in America in 2012, down from 24.2 percent of 442 million phone lines in 2011.⁷ In 2012, only 5% of households relied on traditional switched telephony service (i.e., plain old telephone service (POTS)) exclusively.⁸ When consumers are increasingly abandoning traditional Title II services, it is nonsensical to impose Title II regulations on new technologies.

Classifying broadband as a “telecommunications service” could “potentially expose broadband providers to hundreds of pages of full-blown Title II” regulation.⁹ Examples include having to ask the Commission permission for initiating, modifying or terminating service; rate and tariffing requirements; reporting and recording burdens; network oversight by the Commission; and potential state regulation. These types of regulatory burdens would not provide broadband providers with the flexibility necessary to respond to rapidly changing marketplace developments and consumer demand. In addition, Title II regulation would likely lead to higher monthly bills for consumers. For instance, all telecommunications service providers must assess Universal Service Fund (USF) fees on their customers, which is currently

⁴ NPRM at ¶ 148.

⁵ See, Robert Litan, *Regulating Internet Access as a Public Utility: A Boomerang on Tech If It Happens*, The Brookings Institution, June 2014, available at http://www.brookings.edu/~media/research/files/papers/2014/06/regulating_internet_access_public_utility_litan/regulating_internet_access_public_utility_litan.pdf.

⁶ *Id.*

⁷ FCC, *Local Telephone Competition: Status as of December 31, 2012* at 1 (rel. Nov. 2013), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-324413A1.pdf; and FCC, *Local Telephone Competition: Status as of December 31, 2011* at 1 (rel. Jan 2013), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db0114/DOC-318397A1.pdf.

⁸ Anna-Maria Kovacs, *Telecommunications competition: the infrastructure-investment race* at 11, Internet Innovation Alliance (Oct. 8, 2013), available at http://internetinnovation.org/images/misc_content/study-telecommunications-competition-09072013.pdf.

⁹ Paul J. Feldman, *Net Neutrality 2014: The Regulators Strike Back*, *CommLawBlog.com*, May 21, 2014, available at <http://www.commlawblog.com/2014/05/articles/internet/net-neutrality-2014-the-regulators-strike-back/>.

at a rate of 15.7 percent.¹⁰ Therefore, the Commission would be increasing the cost of broadband access which would jeopardize the various broadband adoption efforts by the Commission, Congress, the Administration, and the business community.

Proponents of Title II argue that such regulation is necessary to prevent “paid prioritization.” However, Title II does not outlaw or even discourage “paid prioritization.”¹¹ Title II prohibits “unjust or unreasonable discrimination”¹² and the Commission has interpreted this provision repeatedly to permit carriers to charge different prices for different services.¹³ Common carriers are “only bound to give the same terms to all persons alike under the same conditions and circumstances,” and “any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge.”¹⁴

Regulating broadband under Title II would harm consumers and the U.S. economy. Reversing more than a decade’s worth of decisions and policy would plunge the industry into years of litigation and cause extreme regulatory uncertainty. By engaging in such a regulatory overreach, the Commission would deter private-sector investment in broadband technology, harm innovation, and slow economic development and job creation. This action could have a wide-ranging impact on the entire Internet ecosystem, not just on broadband service providers.

III. Imposing Title II Broadband Regulations Would Reverse Nearly Two Decades of Bi-Partisan Federal Government Policy that Favors a “Light Regulatory Touch” Approach Toward Broadband

Nearly two decades of bi-partisan support for a policy keeping the Internet free from archaic Title II regulations has been instrumental to the development of the robust broadband marketplace that exists today.

Then-Commission Chairman William Kennard rejected in 1998 the Title II arguments being currently asserted, reporting to Congress that: “Classifying Internet access services as telecommunications services could have significant consequences for the global development of

¹⁰ See, *Proposed Third Quarter 2014 Universal Service Contribution Factor*, CC Docket No. 96-45 (June 12, 2014).

¹¹ Nor should Title II prevent broadband and edge providers from being able to enter into arrangements that block illegal content, Web sites, and other services.

¹² 47 U.S.C. § 202(a).

¹³ See, e.g., *Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010; Establishment of Rules and Requirements for Priority Access Service*, WT Docket No. 96-86, Second Report & Order, 15 FCC Rcd 16720 (2000) (finding Priority Access Service, a wireless priority service for both governmental and non-government public safety personnel, “prima facie lawful” under section 202); *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases Of Switched Access Services Offered By Competitive Local Exchange Carriers; Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket Nos. 96-262, 94-1, 98-157, CCB/CPD File No. 98-63, 14 FCC Rcd 14221 (1999) (granting dominant carriers pricing flexibility or special access services, allowing both higher charges for faster connections as well as individualized pricing and customers discounts).

¹⁴ *Interstate Commerce Comm’n v. Baltimore & Ohio R.R. Co.*, 145 U.S. 263, 283–84 (1892).

the Internet. We recognize the unique qualities of the Internet, and do not presume that legacy regulatory frameworks are appropriately applied to it.”¹⁵

A 1998 letter to then-FCC Chairman Kennard from a bipartisan group of U.S. Senators stated:

The overarching policy goal of the 1996 Act is to promote a market-driven, robustly competitive environment for all communications services. Given that, we wish to make it clear that nothing in the 1996 Act or its legislative history suggests that Congress intended to alter the current classification of Internet and other information services or to expand traditional telephone regulation to new and advanced services.... Moreover were the FCC to reverse its prior conclusions and suddenly subject some or all information service providers to telephone regulation, it seriously would chill the growth and development of advanced services to the detriment of our economic and educational well-being.¹⁶

In 2005, when the Commission argued its position in the *Brand X* case before the Supreme Court, the agency asserted that common carriage regulation likely would “discourage investment in facilities” and spur broadband providers to “raise their prices and postpone or forego plans to deploy new broadband infrastructure.”¹⁷

An examination in 2007 by the Federal Trade Commission (FTC) of the broadband market concluded that there was not “any significant market failure or demonstrated consumer harm from conduct by broadband providers”¹⁸ and that regulators should be “wary” of net neutrality rules because of the unknown “net effects ... on consumers.”¹⁹ The report further cautioned that “[o]nce a regulatory regime is in place, moreover, it may be difficult or impossible to undo its effects.”²⁰

In its 2010 comments to the Commission, the U.S. Department of Justice (DOJ) acknowledged that “most regions of the United States do not appear to be natural monopolies for broadband service.”²¹ In its filing, DOJ strongly cautioned the Commission to consider the impact on investment before adopting any regulations:

¹⁵ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45 (Report to Congress), ¶ 82 (1998), available at http://transition.fcc.gov/Bureaus/Common_Carrier/Reports/fcc98067.pdf.

¹⁶ Bi-Partisan U.S. Senate Letter to FCC. Chairman William Kennard, Mar. 20, 1998, available at <http://cbit.org/wp-content/uploads/2014/06/Senate-Letter.pdf>.

¹⁷ Merits Brief, U.S. Dept. of Justice and FCC, *FCC v. Brand X Internet Servs.*, No. 04-277, at 31 (Jan. 2005).

¹⁸ See, Federal Trade Commission Staff, *Broadband Connectivity Competition Policy* at 11 (June 2007), available at <http://www.ftc.gov/reports/broadband/v070000report.pdf>.

¹⁹ *Id.* at 157.

²⁰ *Id.* at 11.

²¹ *Ex Parte*, United States Department of Justice, Jan. 4, 2010, GN Docket No. 09-51, at 28, available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020355122>.

Although enacting some form of regulation to prevent certain providers from exercising monopoly power may be tempting with regard to such areas, care must be taken to avoid stifling the infrastructure investments needed to expand broadband access. In particular, price regulation would be appropriate only where necessary to protect consumers from the exercise of monopoly power and where such regulation would not stifle incentives to invest in infrastructure deployment.²²

Imposition of Title II broadband regulation would be inconsistent with Congressional intent and previous Commission positions as well as DOJ and FTC market analyses. The Chamber urges the Commission not to reverse nearly two decades worth of bi-partisan “light regulatory touch” policies that have created one of greatest engines of economic development and innovation ever developed.

IV. The Broadband Marketplace is Flourishing

As evidenced by the investment, innovation, and products available in the broadband marketplace, the United States has an “open Internet.” Jobs and new business opportunities are being created because broadband providers are investing tens of billions of dollars every year to upgrade their networks allowing for higher speeds and greater capacity, and, at the same time, innovative broadband-enabled applications, services, and devices are being developed.²³ For, example, according to CTIA, in 2012, there were more than 20 independent non-carrier mobile application stores, offering over 3.5 million apps for 14 different operating systems.²⁴

Unlike other forms of infrastructure, more than 90% of our nation’s telecommunications infrastructure is privately owned.²⁵ Annual capital expenditures by the broadband industry as a whole—including wireline, wireless, and cable operators—totaled \$1.2 trillion between 1996 and 2012.²⁶ In 2013 alone, the broadband industry invested an estimated \$70 billion.²⁷

As a result of this investment, broadband penetration and speeds are increasing. A recent Commission report found that, among other things, the number of connections with downstream speeds of at least 10 Mbps increased by 118% over June 2012, to 103 million connections,

²² *Id.*

²³ See generally, Diana G Carew and Michael Mandel, U.S. *Investment Heroes of 2013: The Companies Betting on America’s Future*, Progressive Policy Institute, Sept. 2013, available at http://www.progressivepolicy.org/wp-content/uploads/2013/09/2013.09-Carew-Mandel_US-Investment-Heroes-of-2013.pdf.

²⁴ Letter from Scott K. Bergmann, Vice President, Regulatory Affairs, CTIA – The Wireless Association, to Thomas Wheeler, Chairman, Federal Communications Commission, WT Docket No. 13-135, GN Docket No. 09-51, at 2 (filed Nov. 13, 2013), available at <http://apps.fcc.gov/ecfs/document/view?id=7520957610>.

²⁵ *FCC Strategic Plan 2009-2014*, Sept. 30, 2008, at p. 75, available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-285705A1.pdf.

²⁶ Patrick Brogan, *Updated Capital Spending Data Showing Rising Broadband Investment in Nation’s Information Infrastructure 1*, USTelecom (Nov.4, 2013), available at <http://www.ustelecom.org/sites/default/files/documents/103113-capex-research-brief-v2.pdf>.

²⁷ *Ex parte* of USTelecom (filed May 14, 2014) available at <http://apps.fcc.gov/ecfs/document/view?id=7521124314>.

including 58 million fixed connections and 45 million mobile connections.²⁸ Similarly, according to Akamai's *First Quarter, 2014 State of the Internet Report*, average peak Internet connection speeds in the United States have reached 40.6 Mbps²⁹ and the number of Internet connections above 10 Mbps has jumped 62 percent in a year.³⁰ Using 4G technologies, "wireless alone now reaches about 97 percent of U.S. households at that speed."³¹ Cable offers 100 Mbps to 85 percent of Americans.³² Products such as FiOS, U-verse, and Google Fiber offer service in other areas or are a competitor to cable when in the same market.³³ Additionally, companies are continually investing in technologies that will allow for faster and faster speeds. For example, Sprint expects its Spark wireless service—that currently offers peak speeds of 60 Mbps—to reach peak speeds of 120 Mbps and 180 Mbps this year and 2015, respectively.³⁴

New, innovative broadband-enabled applications, devices, services, and applications are being announced every day. Yet, we are still in early stages of a broadband economy. Between 2013 and 2018, IP traffic in the United States is expected to increase 2-fold with increase per capita of 47 Gigabytes to 111 Gigabytes.³⁵ In 2018, the gigabyte equivalent of all movies ever made will cross IP networks in the United States every 9 minutes.³⁶ During this same time period, IP video traffic will grow 3-fold, mobile data traffic will increase 8-fold, networked devices per capita will grow from 5.4 to 9.3, and the total number of networked devices will increase from 1.7 billion to 3.1 billion.³⁷

The Internet of Things³⁸ will provide significant benefits and opportunities for consumers, businesses, and our economy. A study by General Electric concluded that the

²⁸ *FCC Releases New Data on Internet Access Services and Local Telephone Competition*, June 25, 2014, http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0625/DOC-327854A1.pdf.

²⁹ Akamai, *First Quarter, 2014 State of the Internet Report*, June 26, 2014, at 21, available at http://www.akamai.com/dl/akamai/akamai-soti-q114.pdf?WT.mc_id=soti_Q114.

³⁰ *Id.* at 22.

³¹ Everett Ehrlich, *The State of U.S. Broadband: Is It Competitive? Are We Falling Behind?*, Progressive Policy Institute, June 12, 2014, at 16, available at <http://www.progressivepolicy.org/wp-content/uploads/2014/06/2014.06-Ehrlich-The-State-US-Broadband-Is-it-competitive-are-we-falling-behind.pdf>

³² *Id.*

³³ See, Anna-Maria Kovacs, *The Internet Is Not a Rotary Phone*, May 12, 2014, available at <http://recode.net/2014/05/12/the-internet-is-not-a-rotary-phone/>.

³⁴ Mike Dano, *Sprint's Saw: Spark to hit 120 Mbps peaks at end of 2014, 180 Mbps peaks at end of 2015*, Mar. 25, 2014, FierceWireless.com, available at <http://www.fiercewireless.com/story/sprints-saw-spark-hit-120-mbps-peaks-end-2014-180-mbps-peaks-end-2015/2014-03-24>.

³⁵ Forecast Highlights, *Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2013–2018.*, Cisco Systems, Inc., June 10, 2014, available at http://www.cisco.com/web/solutions/sp/vni/vni_forecast_highlights/index.html ("Cisco VNI Forecast Highlights").

³⁶ *Id.*

³⁷ *Id.*

³⁸ In her speech last year at the Chamber, Federal Trade Commission Commissioner Maureen Ohlhausen described the Internet of Things as the "next phase of Internet development [focused] on connecting devices and other objects to the Internet, without the active role of a live person, so that they can collect and communicate information on their own and, in many instances, take action based on the information they send and receive." Remarks of FTC Commissioner Maureen K. Ohlhausen, *The Internet of Things and The FTC: Does Innovation Require Intervention* at 1, U.S. Chamber of Commerce (Oct. 18, 2013), available at

Internet of Things could add as much as \$15 trillion to global GDP over the next twenty years, which it noted is roughly “the size of today’s U.S. economy.”³⁹ Cisco estimates that the “Internet of Everything” could be a \$19 trillion opportunity and that by 2020, 50 billion objects will be connected to the Internet.⁴⁰ Devices—excluding PCs, tablets and smartphones—comprising the Internet of Things will grow to “26 billion units installed in 2020 representing an almost 30-fold increase from 900 million in 2009,” according to Gartner, Inc.; the aggregate benefits that businesses derive through the sale and usage of this technology is forecast to be “\$1.9 trillion across sectors in 2020 with manufacturing (15 percent), healthcare (15 percent), and insurance (11 percent)” taking the lead.⁴¹ IDC expects Internet of Things spending on technology and services to generate global revenues of “\$4.8 trillion in 2012 and \$8.9 trillion by 2020, growing at a compound annual rate (CAGR) of 7.9 [percent].”⁴²

For example, with more and more products combining wireless connectivity with mobile computing, cloud services, and sensors,⁴³ individuals are able to take an increased role in managing and generating their own health data. ABI Research’s recent assessment of the mobile health care market found that revenues from wearable wireless devices will increase to over \$6 billion in 2018.⁴⁴ The number of new health and fitness applications increased by 19% in 2013 compared to 2012, according to mobile analytics platform Localytics.⁴⁵ According to a recent Mobiquity survey, 70% of “people use these apps daily or several times a day” and 63% “plan to use health and fitness apps even more over the next five years.”⁴⁶ In the same survey, 53% people reported that they discovered that they consumed more calories than they thought after they recorded intake with their health and fitness apps and 23% found they took fewer steps than they thought.⁴⁷

It is clear that a vibrant “open Internet” exists in the United States and that the U.S. broadband marketplace is thriving. Therefore, the Commission should dismiss calls for Title II

http://www.ftc.gov/sites/default/files/documents/public_statements/internet-things-ftc-does-innovation-require-intervention/131018chamber.pdf.

³⁹ Peter C. Evans and Marco Annunziata, *Industrial Internet: Pushing the Boundaries of Minds and Machines*, at 3 (Nov. 26, 2012), available at <http://files.gereports.com/wp-content/uploads/2012/11/ge-industrial-internet-vision-paper.pdf>.

⁴⁰ Olga Kharif, “Cisco CEO Pegs Internet of Things as \$19 Trillion Market,” *Bloomberg*, Jan. 8, 2014, available at <http://www.bloomberg.com/news/print/2014-01-08/cisco-ceo-pegs-internet-of-things-as-19-trillion-market.html>.

⁴¹ Press Release, Gartner, Inc., *Gartner Says the Internet of Things Installed Base Will Grow to 26 Billion Units By 2020* (Dec. 12, 2013), available at <http://www.gartner.com/newsroom/id/2636073>.

⁴² Press Release, International Data Corporation, *The Internet of Things Is Poised to Change Everything, Says IDC* (Oct. 3, 2013), available at <http://www.idc.com/getdoc.jsp?containerId=prUS24366813>.

⁴³ “Understanding the Role of Wearable Technology in Healthcare,” *PC Quest*, May 16, 2014.

⁴⁴ Press Release, *Led by the Sports, Fitness, and Wellness Segment, Wearable Wireless Device Revenues to Exceed \$6 Billion in 2018*, ABI Research, Sept. 30, 2013, available at <https://www.abiresearch.com/press/led-by-the-sports-fitness-and-wellness-segment-wea>.

⁴⁵ Nicole Kwan, “Health apps, new tech continue to help users live a healthy lifestyle,” *FoxNews.com*, Jan. 24, 2014, available at <http://www.foxnews.com/health/2014/01/24/health-apps-new-tech-continue-to-help-users-live-healthy-lifestyle>.

⁴⁶ Mobiquity, *Get Mobile, Get Healthy: The Appification of Health and Fitness*, Apr. 2014, available at <https://mobiquity.box.com/shared/static/tw3bhxv5iibrgsj66k.pdf>.

⁴⁷ *Id.*

Ms. Marlene H. Dortch
July 15, 2014
Page 8 of 8

regulation of broadband because it is unnecessary and would only serve to stifle the tremendous innovation, job growth, and consumer benefits that are occurring today in the broadband market.

V. Conclusion

The Chamber urges the Commission to reject calls for Title II broadband regulation because today's dynamic, innovative, and competitive broadband market should not be saddled with regulations designed for a bygone era of monopoly telephone service. Moreover, given that the main concern—"paid prioritization"—of those calling for Title II regulation would not be prevented by this burdensome regulatory regime, any consideration of Title II should be dismissed immediately by the Commission.

Sincerely,

A handwritten signature in black ink, appearing to read "William L. Kovacs". The signature is written in a cursive style with a prominent initial "W".

William L. Kovacs