CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

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

1615 H STREET, NW
WASHINGTON, DC 20062
(202) 463-5457

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VIA ELECTRONIC FILING

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

Re: Restoring Internet Freedom (WC Docket No. 17-108)

Dear Ms. Dortch:

The U.S. Chamber of Commerce ("Chamber"), 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, respectfully submits these comments to the Federal Communications Commission ("FCC" or "Commission") in response to its Notice of Proposed Rulemaking ("NPRM") in the above-referenced proceeding—otherwise known as the Restoring Internet Freedom rulemaking.

The Chamber thanks Chairman Ajit Pai for transparently releasing the text of the Restoring Internet Freedom NPRM a month in advance of the Open Meeting which initiated the rulemaking and for providing an extended comment period. The Chamber fully supports the Commission's proposal to classify broadband access as an "information service"[1] as opposed to the 2015 Open Internet Order's [2]designation of broadband service as a "common carrier," which triggered public-utility style regulation of the internet under Title II of the rotary-phone era Communications Act of 1934.

In 2015, the Commission designated broadband service as a common carrier claiming it needed to do so in order to have the legal authority to impose its bright-line net neutrality rules that prohibit broadband providers from blocking[3] and throttling (slowing content)[4] from edge providers (i.e. websites and video streaming services) and engaging in paid-prioritization (the

[1] 82 Fed. Reg. 25568, 25570 (June 2, 2017).
[2] 80 Fed. Reg. 19738 (Apr. 13, 2015).
[3] 47 C.F.R. § 8.5.
[4] 47 C.F.R. § 8.7.

practice of entering into agreements with edge providers for internet fast lanes)[5]. The Commission also adopted a vague General Conduct Standard, requiring broadband providers not to unreasonably interfere with consumer service.[6]

The Chamber asserts that Title II regulation is unnecessary to achieve the benefits of net neutrality, discourages much-needed job-creating capital investment, and limits innovative products and services that could be offered to benefit consumers. Net Neutrality can be achieved without heavy-handed regulatory frameworks like Title II.

I. Title II Regulation and Common Carrier Treatment of Broadband Discouraged Network Investment

In 2005, the Commission deregulated and classified DSL broadband service as an information service, and for the first time in the history of the modern commercial internet, placed essentially all high-speed internet service under a light-touch regulatory framework administered by the Federal Trade Commission ("FTC").[7] Broadband usage and investment thrived after the 2005 deregulation of DSL.

From 2005 to 2013, according to the Pew Research Center, the percentage of American adults with internet connections at home grew from 33 percent to 70 percent.[8] In 2014, the year before adoption of the Open Internet Order which undid a decade of light-touch regulation, virtually all Americans had access to at least two high-speed broadband providers (wireline or wireless) and three fourths of the United States had the ability to use at least two wireline providers such as a cable or phone company.[9] Consumer usage of wireless broadband data increased from 388 billion megabytes in 2010 to 9.65 trillion megabytes in 2015, the year before Title II regulations had taken effect for a full year.[10]

The internet revolution spurred by the FTC's light-touch regulatory framework has given birth to technologies that are changing lives such as smart cities, streaming video, telemedicine, autonomous vehicles, the Internet of Things, and unmanned aircraft. Sensors and products used in smart cities that improve public safety such a gunshot detection technology and public

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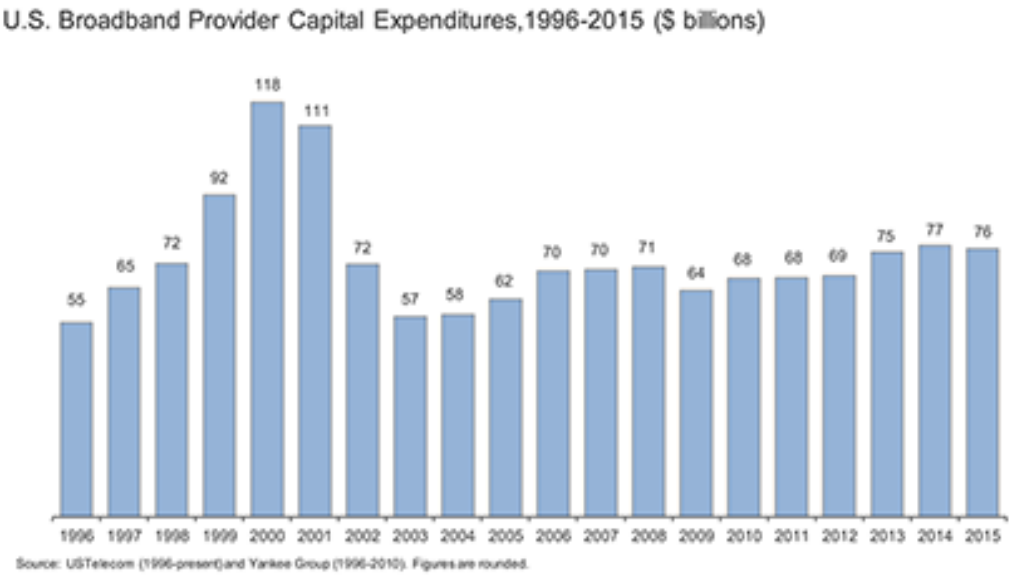
[5] 47 C.F.R. § 8.9.
[6] 47 C.F.R. § 8.11 (Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.
[7] Margeurite Reardon, "FCC changes DSL classification," CNET (December, 11, 2005) *available at* https://www.cnet.com/news/fcc-changes-dsl-classification/.
[8] Kathryn Zickuhr and Aaron Smith, "Tends and demographic differences in home broadband adoption," Pew Research Center (Aug. 26, 2013) *available at* http://www.pewinternet.org/2013/08/26/home-broadband-2013/.
[9] Robert Litan, "Regulating Internet Access as a Public Utility: A Boomerang on Tech if It Happens," Brookings at 2 (June 2014) *available at* https://www.brookings.edu/wp-content/uploads/2016/06/regulating_internet_access_public_utility_litan.pdf (the number of Americans with broadband was determined using the 2014 definition of high-speed internet).
[10] CTIA-The Wireless Association Annual Year-End Survey Results *available at* https://www.ctia.org/docs/default-source/default-document-library/annual-year-end-2016-top-line-survey-results-final.pdf?sfvrsn=2.

transportation efficiency systems will rely heavily on wireless technology such as 5G. A study by Accenture estimates that the economic impacts of 5G technology could be $275 billion in investment that leads to $500 billion in GDP growth and three million jobs created.[11] A town with a smaller population such as Saratoga, CA could reap $20 million from investment in 5G while a major city such as Chicago would benefit from close to $8 billion in investment.[12]

Unfortunately, the benefits and investment of innovative technologies could be slowed or unrealized as of the result of Title II classification of broadband. Smart connected technologies need reliable broadband and the only way to ensure expanded and faster internet coverage is through investment. One of the most effective ways to promote capital expenditures in broadband is to remove regulatory burdens and Title II is one of the more onerous burdens hanging over internet service providers ("ISPs").

When the internet industry was lightly regulated, investment thrived. In 2004, the year prior to deregulation of DSL, capital expenditures in the industry were nearly $58 billion for the year. By 2014, the year before Title II reclassification, capital expenditures had risen to an annual amount of approximately $77 billion.[13] Figure 1 below shows the history of overall broadband capital expenditures.

Figure 1:



[11] Accenture Strategy, "Smart Cities: How 5G Can Help Municipalities Become Vibrant Smart Cities" at 1 (2017) *available at* https://www.ctia.org/docs/default-source/default-document-library/how-5g-can-help-municipalities-become-vibrant-smart-cities-accenture.pdf.
[12] *Id*. at 2.
[13] US Telecom, Historical Broadband Provider Capex *available at* https://www.ustelecom.org/broadband-industry-stats/investment/historical-broadband-provider-capex.

Although broadband investment appears to have declined over the years, context is important in explaining these drops. According to Hal Singer of the George Washington University's Institute for Public Policy:[14]

> [T]here have been only two occasions in the history of the broadband industry when capex declined relative to the prior year: In 2001, after the dot.com meltdown, and in 2009, after the Great Recession. In every other year save 2015, broadband capex has climbed, as ISPs…were forced to upgrade their networks to prevent customers from switching to rivals offering faster connections.

It is interesting to note that the only year of broadband investment decline other than the dot.com burst and the Great Recession occurred in the first year after the adoption of Title II regulation of the internet. Singer has also concluded that "[d]omestic broadband capital expenditures ('capex') declined sharply in 2016 relative to 2014, the last year before reclassification as a common carrier. Relative to 2014 levels, the twelve largest ISPs invested $3.6 billion less in domestic broadband in 2016, a 5.5 percent decline."[15]

Even wireless technology that will drive 5G technologies has undergone decreased capital investment in the wake of FCC's classification of broadband providers as common carriers. While it remains possible to argue that the decline in capital expenditures resulted from decreased reliance on wireline broadband infrastructure, wireless internet has also experience a large decline in investment as well. From 2014 to 2016, the years in which broadband has operated under Title II regulation, "the cumulative decline in annual capex during those three full years was $6.8 billion, or around 20 percent, with $5.6 billion of that in 2016, the first full year of Title II implementation for wireless broadband."[16] Anna-Marie Kovacs of the Georgetown Center for Business and Public Policy remarked that "[w]hat makes the decrease in capital investment event more striking is that it occurred during a period [of] phenomenal traffic growth."[17] Figure 2 below shows the decreased capital expenditures in the wireless industry as outlined by CTIA's industry wireless survey results:[18]

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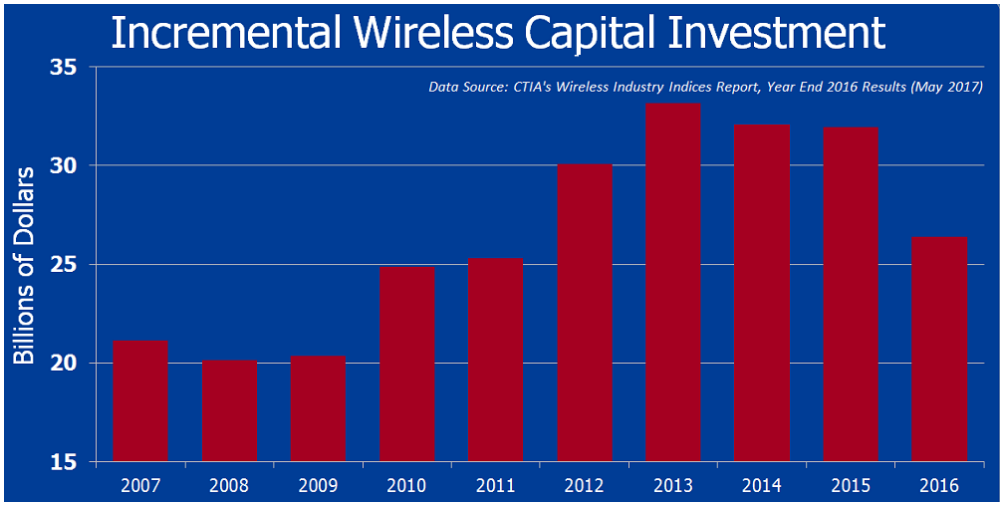
[14] Hal Singer, "Does the Tumble in Broadband Investment Spell Doom for the FCC's Open Internet Order?" Forbes (Aug. 25, 2015) *available at* https://www.forbes.com/sites/halsinger/2015/08/25/does-the-tumble-in-broadband-investment-spell-doom-for-the-fccs-open-internet-order/#6fce80d11ef5.
[15] Hal Singer, "Bad Bet By FCC Sparks Capital Flight From Broadband" Forbes (Mar 2. 2017) *available at* https://www.forbes.com/sites/washingtonbytes/2017/03/02/capital-flight-from-broadband-in-the-title-ii-era/#6f6d1a3e35cf.
[16] Anna-Marie Kovacs, "Has Title II Regulation Stifled Wireless Investment? Here's What the Numbers Have Say," Wireless Week (June 15, 2017) *available at* https://www.wirelessweek.com/article/2017/06/has-title-ii-regulation-stifled-wireless-investment-heres-what-number-say.
[17] *Id*.
[18] *Supra* note 5.

Figure 2:



It is abundantly clear that investment in broadband declined in the wake of the Commission's decision to regulate broadband under Title II. The broadband industry witnessed declines in investment for the first time in history outside the context of major macroeconomic events affecting the entire economy.

II. Title II Classification and Common Carrier Treatment of Broadband is a Regulatory Overreach that Has the Potential to Harm Consumers.

The Commission claimed that it needed to classify broadband service under Title II in order to achieve the core principles of net neutrality against blocking, throttling, and paid-prioritization.[19] Unfortunately, Title II enabled the Commission to engage in new regulatory activity with regard to business practices such as rates and privacy which inevitably have the potential to harm consumers.

A. Rate Regulation

Although the 2015 Open Internet Order specifically granted forbearance against prescriptive rate regulation, the Commission did not rule out taking after-the-fact enforcement actions against ISPs for consumer charges.[20] In fact, the FCC, in the waning days of the previous presidential administration, issued a report stating that certain rate practices of broadband providers, such as those that allow consumers to view certain content without being charged against their data cap, violated the General Conduct Standard of the Open Internet Order.[21] For example, if a consumer were to view content affiliated with their wireless provider and not have

[19] 80 Fed. Reg. 19738, 19743 (Apr. 13, 2015).
[20] *Id.* at 19810.
[21] Federal Communications Commission, Wireless Telecommunications Bureau Report, Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero-Rated Content and Services (Jan. 11, 2017) *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0111/DOC-342982A1.pdf.

that data count against their contractual data cap, the broadband provider would have been in violation of the Open Internet Order.

Such enforcement of ISP billing practices is contrary to what consumers want. Polling has indicated that free data programs such as these are extremely popular with all consumers, especially with those aged 18 to 34.[22] In fact, 98 percent of people in this age group were more likely to stay with a carrier using "free data" plans while 77 percent would switch to another provider for one.[23]

Later in 2017, the FCC under Chairman Pai's leadership announced that the investigation into these free data programs would be dropped.[24] Although consumers now enjoy innovative billing methods under "free data" plans, a future FCC could once again return to the issue under the current Title II regulatory framework. The threat of future rate regulation furthers regulatory uncertainty which is not conducive for expanded broadband investment.

B. Privacy

In December 2016, the Commission published in the *Federal Register* its broadband privacy rules which the FCC promulgated under its newly-found Title II authority in Section 222 of the Communications Act. The rules prohibited internet service providers from using their consumers' data regarding virtually all internet usage without first obtaining customer consent to do so.[25] The rule suffered because it was fundamentally unfair, arbitrarily treating data privacy differently based on the type of entity using it. For instance, websites remained under the flexible light-touch privacy framework of the Federal Trade Commission while broadband providers were required to follow prescriptive rules. For this reason, Moody's Investor Services stated that the rule had the ability to negatively impact the credit of broadband providers.[26] Such a move could have also impacted the ability of internet service providers to make needed investment in broadband deployment.

Additionally, the FCC's privacy rule approach threatened the "free website"-based online advertising market. Recent polling has suggested that a beneficial use of data such as targeting relevant advertising, which would have been affected by the rule, is preferred by most Americans.[27] Digital advertising in fact contributes hundreds of billions of dollars in revenue to the U.S. economy and provides for nearly one million jobs.[28]

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[22] Debra Berlyn, "Free data: Focus on consumers," *The Hill* (Dec. 16, 2016) *available at* http://thehill.com/blogs/congress-blog/technology/310674-free-data-focus-on-consumers.
[23] *Id.*
[24] Taylor Hatmaker, "Trump's FCC just dropped all investigations into zero-rating practices," *TechCrunch* (Feb. 3, 2017) *available at* https://techcrunch.com/2017/02/03/pai-zero-rating-fcc/.
[25] 81 Fed. Reg. 87274, 87344 (Dec. 2, 2017).
[26] "Moody's Says FCC internet privacy proposal could harm broad internet providers," Reuters (Mar. 15, 2015) *available at* http://www.reuters.com/article/us-usa-fcc-internet-moody-s-idUSKCN0WH1TC.
[27] Grant Gross, "Survey: Internet users like targeted ads, free content," PCWorld (Apr. 19, 2013) *available at* http://www.pcworld.com/article/2035836/survey-internet-users-like-targeted-ads-free-content.html.
[28] The Value of Data 2015: Consequences for Insight, Innovation & Efficiency in the U.S. Economy (2015) *available at* https://thedma.org/advocacy/data-driven-marketing-institute/value-of-data/.

The rules would have taken effect had it not been for Congress's use of the Congressional Review Act to vitiate the rule.[29] Even though broadband providers are now not required to follow the rules—but are still subject to Title II's privacy statute—a future FCC using its Title II authority could issue new and overly-burdensome rules.

These concrete examples show directly how Title II authority outside the core elements of net neutrality can negatively impact the business practices of internet service providers as well as consumers. The 2015 Open Internet Order's adoption of the "common carrier" designation for ISPs shattered the concept of regulatory parity between internet service and edge providers creating regulatory uncertainty.

III. Title II Authority and Common Carrier Treatment of Broadband Is Not Necessary to Achieve Net Neutrality.

The Chamber supports a free and open internet, but the usage of Title II as the legal authority to adopt its net neutrality rules promotes a regulatory imbalance that produces more harms than benefits. In 2014, while striking down the FCC's 2010 earlier attempt at net neutrality regulations, the D.C. Circuit for the United States Court of Appeals in *Verizon v. Federal Communications Commission* held that the Commission had the authority in general under Section 706 of the 1996 Telecommunications Act to regulate broadband, and enact policies to "accelerate broadband deployment if and when it determines that such deployment is not 'reasonable and timely'."[30]

Such regulation could include net neutrality principles so long as the rules did not effectively treat internet service like a common carrier if the FCC still designated broadband as an "information service."[31] The court struck down many provisions of the 2010 proposal because they effectively treated broadband like a common carrier despite broadband service not being designated as such.[32] The court held that anti-discrimination provisions in the 2010 proposal too similarly mirrored requirements imposed on common carriers.[33] On the other hand, the court expressed that Section 706 authority could possible allow the Commission to impose rules against blocking content but the Commission failed to distinguish in its case between its anti-discrimination and anti-blocking rules; thus, all of the net neutrality rules in the 2010 proposal were struck down by the court.[34]

The court in *Verizon* provided the Commission with a roadmap to achieve net neutrality principles without the heavy-handed public-utility regulatory framework of Title II. While many argue that Title II provides the best legal footing to promote net neutrality rules, the burdens of the costly regulatory framework do not justify its benefits. As an analogy, if the user of a computer no longer wanted to view a webpage, that person could simply click off the page as

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[29] *See* Pub. Law 115-22.
[30] *Verizon v. Fed. Commc'ns Comm'n*, 740 F.3d 623, 641 (D.C. Cir. 2014).
[31] *Id*. at 650.
[32] *Id*. at 658.
[33] *Id*.
[34] *Id*.

opposed to unplugging and throwing away the computer. Throwing away the computer is the surest way of not viewing the page but in the end the user is left without the infrastructure to later use the internet. Title II regulation of broadband is the equivalent of the user unplugging the computer. Taking this in mind, the Commission should follow the *Verizon* court's regulatory roadmap to achieving a free and open internet.

Given the large amount of deference that the courts have granted to the Commission to change the classification of broadband[35], there will continue to be regulatory uncertainty regardless of the outcome of the Restoring Internet Freedom rulemaking because a future FCC could change its mind again. The Chamber believes that the best way to ensure that net neutrality coexists with a broadband industry not treated like a public utility is for Congress to permanently codify net neutrality protections while classifying broadband as an "information service" to be regulated by the FTC.[36] Congress should provide clarity and the final world on the governance of broadband.

IV. Conclusion

The internet revolution was spurred in part by the FTC's light-touch regulation of the internet as an "information service." The decade after deregulation of DSL internet saw massive infrastructure investment and innovation including the birth of the Internet of Things, streaming on-demand video, and smart cities—all without public-utility style regulation. After all of the economic growth derived from the internet in the 2000s, the FCC unwisely decided to regulate broadband like a public utility in its 2015 Open Internet Order, which was used to micromanage the business practices of ISPs, and discourage much-needed investment. The Commission should right this policy mistake by classifying broadband as an "information service," eliminating Title II regulation of the internet, and returning rate and privacy authority back to the FTC to restore regulatory parity and internet freedom.

Sincerely,

William L. Kovacs

[35] *Nat'l Cable & Telecomms. Assn'n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005); *United States Telecom Ass'n v. Fed. Commc'ns Comm'n*, 825 F.3d 674, 707 (D.C. Cir. 2016).
[36] *See e.g.*, Draft Legislation, 114th Congress *available at* http://docs.house.gov/meetings/IF/IF16/20150121/102832/BILLS-114pih-NetNeutrality.pdf.