

February 26, 2015

The Honorable Tom Wheeler  
Chairman  
Federal Communications Commission  
445 12th Street, NW  
Washington, D.C. 20554

Dear Chairman Wheeler:

We are writing to express our deep disappointment with the Federal Communications Commission's ("FCC") narrow approval of the "Open Internet" rules. The Commission's actions today threaten the future viability of the Internet and America's ability to compete in the global technology marketplace. Today's rules do not offer an enduring solution, only a partisan headline for a partisan initiative that is destined for years of litigation, generating years of debilitating uncertainty.

Contained in the last correspondence from the Committee on this issue is an outline of the various reasons that antitrust enforcement is superior to regulation in protecting an open Internet.<sup>1</sup> Notwithstanding your response that you "strongly believe in the rigorous application of antitrust laws" and that "[s]trong, enforceable Open Internet rules can work in tandem with antitrust law to meet net neutrality principles, protect consumers, and promote free expression,"<sup>2</sup> your actions today stand in direct conflict with these statements. In short, the substance of the rules contradicts your rhetoric.

This is chiefly because the "Open Internet" rules approved by the FCC subject Internet market participants to Title II of the Communications Act, the most oppressive and backward regulatory option possible. By imposing this heavy regulatory burden, the rules endanger the effectiveness of future antitrust enforcement and may result in removing the Federal Trade Commission, one of our two antitrust enforcement agencies, from enforcing both antitrust *and* consumer protection laws. This is hardly an outcome that allows the "Open Internet" rules to "work in tandem with antitrust law" or one that will "protect consumers."

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<sup>1</sup> A copy of this correspondence is attached hereto as **Exhibit 1**.

<sup>2</sup> A copy of this correspondence is attached hereto as **Exhibit 2**.

Furthermore, the assertion that these rules will “foster innovation and competition”<sup>3</sup> lacks factual or historical support. Witness testimony before the House Judiciary Committee on this very issue detailed the many instances in which regulation of the kind manifested by Title II and the Commission’s new rules stifled competition, including in the context of both railroad transportation and long-distance telephone networks.<sup>4</sup> Indeed, it was antitrust law, not regulation, which ultimately introduced competition to the long-distance telephone market.

We are also troubled by the manner in which the “Open Internet” rules were formulated. On November 10, 2014, President Obama urged the FCC to impose Title II regulations on the Internet.<sup>5</sup> Shortly thereafter, you began making statements in support of a Title II approach. Certainly, the timing of your support for Title II following the President’s recommendation calls into question the degree, if not the existence, of the FCC’s independence from the White House. Our concerns that the Commission’s independence has been politically compromised are only heightened by recent reporting that the Commission’s new approach was developed by a “shadow FCC” at the White House, then forced on the Commission by President Obama after the November 2014 election.<sup>6</sup>

[Note: The following paragraph is based on intelligence we have received that the FCC may be actually be rewriting Title II, not just interpreting and implementing it. We propose to insert this paragraph once the text of the rules are released, if we can confirm the assertions it contains and provide an illustrative example.] [Finally, we are deeply concerned that the text of the regulations manifests a view by the White House and the FCC that the laws of Congress may be rewritten unilaterally by a regulator. For example, the “Open Internet” rules amend Title II [insert textual example]. In other words, the FCC does not implement, but actually attempts to *amend*, the text of a law passed by Congress. The amending of statutes is a role the Constitution vests exclusively in the Congress.<sup>7</sup> An attempt by a Commission composed of unelected Commissioners to amend a statute is an affront to the very foundations of our democracy.]

We will not stand by idly as the White House, using the FCC, attempts to advance rules that imperil the future of the Internet. We plan to support and urge our colleagues to pass a Congressional Review Act resolution disapproving the “Open Internet” rules. Not only will such a resolution nullify the “Open Internet” rules, the resolution will prevent the FCC from relying on Title II for any future net neutrality rules unless Congress explicitly instructs the FCC to take such action.

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<sup>3</sup> Fed. Commc’ns Comm’n, *Chairman Wheeler Proposes New Rules for Protecting an Open Internet* (Feb. 4, 2015), <http://www.fcc.gov/document/chairman-wheeler-proposes-new-rules-protecting-open-internet>.

<sup>4</sup> See “*Net Neutrality: Is Antitrust Law More Effective than Regulation in Protecting Consumers and Innovation?*”: *Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. (2014).

<sup>5</sup> White House, *Net Neutrality: President Obama’s Plan for a Free and Open Internet* (Nov. 10, 2014), <http://www.whitehouse.gov/net-neutrality>.

<sup>6</sup> Gautham Nagesh and Brody Mullins, *Net Neutrality: How White House Thwarted FCC Chief*, WALL ST. J., Feb. 4, 2015, *available at* <http://www.wsj.com/articles/how-white-house-thwarted-fcc-chief-on-internet-rules-1423097522>.

<sup>7</sup> U.S. CONST. art I, § 1.

Additionally, the Judiciary Committee plans to hold a hearing on the “Open Internet” rules on March [TBD], 2015. We would welcome your testimony at this hearing, where you will have an opportunity to explain how the “Open Internet” rules accommodate effective antitrust enforcement, as well as discuss the serious threats the rules pose to the Internet’s viability and America’s competitiveness. Regardless of your participation, the Committee will hold an open and transparent proceeding that will allow for a public debate regarding the impact of the FCC’s rules on the future of competition on the Internet. This stands in stark contrast to the closed-door, partisan process that resulted in 300-plus pages of rules that the public had access to only after they were approved by a slim majority of unelected Commissioners, following White House political influence.

Finally, to the extent a public record supports further action, we will consider introducing legislation to ensure the antitrust laws are the preferred enforcement method against anticompetitive conduct on the Internet. Moreover, given how the FCC has exercised its authority, this legislation may include a restriction on the FCC’s ability to regulate the Internet.

Rest assured, the Committee on the Judiciary will take every action necessary to ensure that the Internet remains a free, competitive marketplace.

Sincerely,

Bob Goodlatte  
Chairman  
House Committee on the Judiciary

cc: Speaker John Boehner  
House Energy and Commerce Committee Chairman Fred Upton  
Commissioner Mignon Clyburn  
Commissioner Jessica Rosenworcel  
Commissioner Ajit Pie  
Commissioner Michael O’Rielly