MADERY BRIDGE
ASSOCIATES, LLC
A Bridge to Understanding

July 17, 2017

Via ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

Re: In the Matter of Restoring Internet Freedom, WC Docket No. 17-108

Dear Ms. Dortch:

As the Commission has stated in its Notice of Proposed Rulemaking, over 50 years ago, "[l]ong before the commercialization of the Internet, federal law drew a line between the heavily regulated common carrier services and more lightly regulated services that went beyond mere transmission. And for almost twenty years, the Internet flourished under a light touch regulatory approach."

Political leaders on the Hill via the 1996 Telecommunications Act, the courts, Presidents and FCC Chairmen including one Democrat and then two successive Republican FCC chairmen, outlined and ultimately published a "policy statement" that brought definition to the idea with four principles that should be preserved by the broadband industry. And for well over a decade these bi-partisan principles were followed. All of this "to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation."

The goal of more broadband, more places, more often, and for more people was being met. The light touch regulatory model powered by a free market was the grounding for that success. No other model conceived even comes close to seeing the level of consumer freedom flourish alongside consumer choice. From 1996 until 2015 the internet was routinely bringing new, exciting innovations forward that not only appealed to "netizens" and the online ecosystem but also continued to attract those who were not yet taking part. Investments, from capital expenditures to research and development to hiring to creation and innovation, were all taking place at an astonishing rate.

But for some this was not the vision they had for the one-sixth of the U.S. economy that is the internet ecosystem, an area of the economy that had remained fairly free of government micromanagement.

Instead they were on a quest to force a different, less effective, more consumer restrictive, intellectual experiment. And so in 2015 the FCC decided to capitulate to political pressure, abandoning its role as an independent, expert agency for communications issues, and along a strict party line determination brought ISPs under the heavy handed government control rules of Title II that went far beyond the four principles of net neutrality.

That decision exposed that the FCC fundamentally misunderstood its role as opposed to the role of Congress, how and why investments were made in the vast internet ecosystem, and that in fact the "web" was not a web at all but rather an ecosystem.

There is an Ecosystem, Not a Web, and it is Full of Life

Platforms such as social networks, search engines, operating systems, webmail, browsers, mobile apps, and e-commerce are proliferating. These platforms are simply layers, that create a "stack" as new products or services are built upon them. The relationship between these various layers of the ecosystem, including service providers, is tightly woven in part because of the vertical integration but also because of contracts and interdependencies. Upsetting or isolating one part of the stack does not necessarily lead to linear and predictable results. In fact, observation informs us that the opposite is typically true. Innovation in the internet and communications space moves rapidly but unevenly. Perhaps nowhere else is "supply creating its own demand" more observable than in this technology space, yet even understanding that only allows innovation experts the most-slender of chances to understand where innovation is headed next. Humility is the correct approach for prognosticators. Most harmful is regulatory hubris which regularly leads to any number of unintended consequences and is damaging pollution to this ecosystem. Desperate attempts to try to bring order to what, to continue to be effective, is not orderly are doomed to failure or only succeed in suffocating innovation.

When the Internet ecosystem is under attack and as such the entire ecosystem needs to respond, not be artificially divided by arbitrary government intervention. A change to any part of the ecosystem has an impact on all parts of the ecosystem. The well-being of the internet, at least as it exists in the U.S., is dependent on all parts of the ecosystem being healthy, and free from interference. True success in the digital world is achievable when all parties understand that they cannot stand on their own, that in fact an economically thriving digital ecosystem requires cooperation with an eye towards what is best for the broader ecosystem. The distributed nature of the Internet is a fundamental part of its design, and no one entity, no one cluster of entities, can be an island. Stakeholder cooperation is imperative for the success of all – and that includes a FCC that truly understands this ecosystem.

Misunderstanding that it is in fact an ecosystem leads some to conceive of it as merely a two-dimensional construct when in fact it operates in three dimensions. Two-dimensional thinking leads to the errant conclusion that there are "areas" of the ecosystem that can be altered without massively effecting the entire environment. For example, there are no such things as "edge providers." They operate like nearly all other parts of the ecosystem with new layers building upon them and various operators interconnecting with them. Such a designation is more akin to a marketing pitch than to a technological truth. Trying to isolate such entities for heavy regulation will negatively impact the entire

space. The same is true if trying to isolate service providers for government control. Those interacting with the ecosystem will find it hard to leave, or switch, from any particular area to another be it service provider, social media, operating system, etc. This is not a negative. Consumers choose where they are most comfortable and make their place there. Government intervention that will limit those options, or preference one part of the ecosystem over another are inherently harmful directly to consumers.

Inhabiting, using and benefiting from the ecosystem are those who often used to be called "netizens," and later, for those who do not remember a time without the internet "digital natives." The "netizens" used to be proud of the unregulated nature of the internet. Proud that there was a certain wild west element that promised interesting, cool and cutting edge. Then, industry regularly came to Washington, D.C. to tell politicians to leave the internet alone – "Hands Off!" That was not very long ago, but something has happened. These days, some activists pursuing their own visions instead of safeguarding freedom for the netizens, have tried to persuade people to believe that people now live in constant fear of hypothetical threats and cannot function fully unless government firmly grasps the internet and holds it tight. These sorts of distortions of the truth trap the ecosystem, and many of those who can gain the most from using it, in a make believe dystopian fantasy narrative. In truth, liberty frees those in the internet ecosystem just as it does elsewhere allowing them to pursue their lives, creating an online experience that they desire, not what is dreamt up for them in D.C. In other words, netizens deserve an open internet ecosystem.

No one should mistake that there is anything but near unanimous belief amongst all political tribes that an open Internet should exist. No advocacy group, political party, industry or consumer group is advocating for consumer harm. Only a small, loud, activist, agenda driven cabal argues for government restriction and control. Inarguably, the best way to preserve an open internet is precisely how an open internet has been preserved for this long, via the free market. That is how consumers will continue to be protected, how consumers will continuously benefit from the innovation, investment and creation that follows, and how consumer experiences with content, technology, and information can be consumer driven not government determined.

Here is the goal then: less regulations so that more broadband will lead to greater consumer choice from across the ecosystem, the demand which will then drive the need for more supply, provided via greater investment, leading to even greater consumer choice. It IS an ecosystem and one thing does beget the next.

Investment and Innovation in the Ecosystem

This notice of proposed rulemaking marks the next step in hopefully moving the U.S. back to dreaming of the future, embracing innovation, and restoring a free and open internet to consumers so that innovation, investment, opportunity and creativity can once again flourish. The language of the notice implies the necessity of net neutrality rules, which highlights that the question of whether light touch regulation would remain is not really at issue. Correctly, the real question is whether the internet should be restricted by a decades-old law and be a government utility – a tangle of laws and regulations that brought us such celebrated innovations as an extra-long cord for the touch-tone phone receiver. Or

if rather the FCC should look to supporting an appropriate framework for promoting an open internet by empowering lawfully operating consumers.

The bi-partisan, light-touch regulatory approach is the environment in which the internet ecosystem flourished. Started by Congress in the 1990's the approach allowed the internet to deliver great value and innovation after innovation to every citizen. The amount of investment in broadband infrastructure during the time was unmatched, which drove not just jobs but careers. Economic growth was obvious. There is no evidence that such opportunities are played out. In fact, there is no evidence that anything negative happened under the free and open approach. So, it made no sense that the FCC abandoned this paradigm in 2015, moving to an 80-year-old paradigm designed for rotary phones and one national monopolistic carrier of phone calls, shifting regulation of the internet to Title II.

Supporters of the political move have tried to convince the public that without Title II that nothing governs what the internet ecosystem, or its various players, can do. Nothing could be further from the truth. Even without such government interference broadband providers are still burdened, they are burdened by the undeniable forces of the marketplace to provide uninterrupted, ubiquitous and affordable service. This is as it should be – competition played out in the free market to benefit every citizen not a fight played out in the halls of the FCC by companies with rules drafted by government to the benefit of bureaucrats.

How can the marketplace so obviously be a better governor of the internet ecosystem than government? Simple – Are customers likely to stay with a company that intentionally blocks access to its service? Hardly. Moreover, government simply cannot keep up with the pace of innovation, heavy regulations or restrictive legislation will result in what is completely predictable, less innovation and higher costs for consumers.

Internet service providers rebuild systems every eighteen to twenty-four months. They do this just to keep up with consumer expectations. The cost is high, the engineering complicated, and the upkeep challenging, and that is all before customer one begins making yet new demands on the system. Adding additional negative pressure on the potential for returns on their investment does not take long to begin playing out resulting in systems being rebuilt more slowly, systems not being rebuilt or not being built at all. This is already evident since the imposition of Title II.

As the Chairman has noted, domestic broadband expenditures have fallen since the rules were put in place. The decline was not by some small margin. A full $3.6 billion was not spent, a 5.6% drop from the previous year, which was also the first time that the investment dropped outside of a recession. That is $3.6 billion in innovations, jobs and careers not created because of errant FCC policy. Even worse, other countries have become more attractive for investment as internationally investments increased. Americans again left behind because of politically motivated, fact-less government rule making.

Title II is the world of anti-innovation, or at best, innovation at the speed of government. This is a world where companies in the internet ecosystem must beg an unelected FCC for permission to try something

new. And worse, this is a world where the next disruptor is kept out, typically not being able to afford a horde of lawyers and lobbyists to find the means to have permission granted for their next big idea. This is a not a world of the smart network, a smart system, or a smart city but rather a world of the delayed, the mediocre and of government granted and protected monopolies. This is a world where the right of contract is severely constrained and new business models looked upon with suspicion. This is a world where AT&T, Google, Comcast, Facebook, Verizon, Amazon, Charter, Netflix and many others will never be able to provide the next most innovative offerings to the public as quickly and seamlessly as they can do today.

Changing or even "overturning" these rules would restore a free and open internet, restoring an internet that once again includes a light regulatory touch while staying out of the way of progress, innovation and invention. All the bizarrely titled "net neutrality" rules did was to layer in costs, adding gratuitous restrictions that limit innovation and the necessary continued investment to bring consumers better, faster internet service. In other words, the rules are anti-consumer. No harm was ended because no harm was ever shown. No freedoms were given, in fact liberty was reduced. The easy to see, honest, bottom-line? Consumers lost. Changing these regulations restores what was lost.

Of course, some businesses, and pro-regulatory groups, did gain by the institution of the arcane new rules. When any regulation or law is put in place, business operations grow up around it resulting in winners and losers. But that is not a reason to perpetuate poor public policy. Moreover, the rule was only approved in 2015 and under constant legal attack since then. The notion that industries have built up in that little time, in the midst of uncertainty, is a stretch. To the extent that businesses have grown during this time it has been by doing their best to provide stable, fast broadband even as government continued to upset the ecosystem. In a competitive environment, consumers required internet providers to create a consistent, quality and open system to retain them as customers.

In all, the new scheme puts at risk the tens of billions of dollars every year that broadband providers spend to expand and improve their networks to the benefit of consumers – a total of $1.2 trillion over the years. And as wireless is swept in, that number grows hugely -- $30 billion invested last year alone.

For the entirety of the history, since the internet went public, such government control was not necessary and, in general, people found the benefits to consumers, the innovation, and the vision nothing short of breath taking. So, what changed? Nothing really other than an activist Chairman in place when radicals were whispering in his ear. But now everything is really changing. Investment has decreased, innovation is waning, consumers will end up with less choice and higher costs. This is why we need Congress to step in, so such wild fluctuations in governance will end and so consumers can in fact have a stable marketplace in which to conduct business, find entertainment, communicate with family or friends, be assisted in their healthcare and seek information.

The Role of Congress

Congress has structured government's role in the internet ecosystem since the beginning when it weighed in via the 1996 Communications Act, fully aware of the internet if not certain of its magnitude.

An affirmative choice was made in how much government control there should be in this new frontier. The Act includes only one mere reference to the internet and makes clear that the wonderful innovative, creative nature of the ecosystem should be preserved. Section 230 of the Communications Act says that the policy is, "to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation." There is here a notable absence of authority granted to the FCC to seek heavy handed regulations or otherwise insinuating some broad regulatory mandate into the ecosystem.

Further, to make sure the direction was clear, Congress weighed in again two years later with five senators writing to the Commission. Senators John Ashcroft, Spencer Abraham, Wendell Ford, John F. Kerry and Ron Wyden wrote saying 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." They continued, clearly anticipating that the call for ubiquitous regulation would come, specifically addressing information services and the damage that would be caused by a reclassification to Title II that it would "…seriously would chill the growth and development of advanced services to the detriment of our economic and educational well-being."

Clear, consistent and limited government maximizes liberty, creativity and invention allowing the maximum opportunity for economic growth, development, jobs and careers. But that does not mean that all government is retreating from the ecosystem. Actually, much government will remain and should do so to deter fraud, enforce contracts and arbitrate disputes, all appropriate roles for government. Light regulatory touch does allow for the government to step in and prosecute bad actors when there is actual consumer harm.

For example, the FTC has decades of experience protecting privacy, enforcing consumer rights, ensuring that companies live up to various reasonable standards, in general protecting consumers from bad actors. The Department of Justice, and state attorneys general, are other parts of government that have obviously relevant tools in this area. The decision is not a binary one -- FCC control or nothing. In fact previous to the imposition of Title II even alleged violations of the four principles were quickly addressed by the courts or other institutions of government.

Some have claimed that section 706 gives a sort of power to the FCC to be the primary institution to actively regulate the internet. This is curious though, given that the FCC never claimed to have such authority until suddenly upon a re-reading of the Telecommunications Act decades after it became law, and blatantly ignoring the expressed intent of Congress, found that indeed it had broad and sweeping authority to regulate the entirety of the internet ecosystem. With this authority the FCC could, and did, begin to create damaging privacy regulations before being stopped by an election, and could go on to create new regulations governing indecency, copyright or cybersecurity to name a few despite such authority residing elsewhere in the federal government. To say that the implications for online free speech are huge is to understate the threat – the very threat from which the First Amendment seeks to protect U.S. citizens.

The section 706 authority creation fantasy does serve as a cautionary tale for Congress. Congress needs to do its job and draft laws knowing that regulators will bend and twist their language to seek greater and greater authority for actions unmoored from intention. Legislative proposal drafting needs to consider this and appropriately draft language that does not let the administrative state run amok. But specifically, to section 706, Congress must weigh in and make crystal clear its original intent, that in fact the FCC has no such authority.

The Need for Clear, Uniform Rules

Consumers should be free to access content, free to run applications, free to attach devices and have the ability to obtain service plan information. These four principles should guide and inform the FCC not the desire to seek ubiquitous control of an ecosystem that will continue to thrive if allowed to do so. Rules should also make clear that service providers have the freedom to manage their networks appropriately, not least so that speed and service quality can be maintained, to make sure that the ever-increasing online traffic be managed so all may benefit.

There are those who use enormous amounts of bandwidth to provide their services and would oppose such sensible clarifications so that they can continue to be free riders on the backs of consumers. But, network neutrality is the notion of an "open internet." That is to say that customers should be able to access what they want online. The imposition of Title II has moved the country away from that goal by suddenly creating government formed utilities, government sanctioned monopolies. History proves that government monopolies to do serve consumers well.

As destructive as this move towards regulatory ubiquity, are rules that whip saw back and forth depending on party in power or part of the ecosystem that has a louder voice. Such radical uncertainty is the bane of investment and particularly of short and long-term capital expenditure. Congress is the only entity that can instill the certainty, the permanence of supportive public policy for all consumers, clearly defining the authority of the FCC and the breadth of enforcement of it, or the FTC, has to enforce the principles of a free internet. Congress must clarify that the FCC must modernize its thinking and not take 80-year-old constructs of regulation to apply today. That is lazy and unworthy in an industry defined by innovation, and in a country that used to take pride in leading and finding new frontiers.

Congress should also affirmatively address the challenges of a heavy regulatory hand on the internet ecosystem and the very real concern about the freedom of speech it brings. Some have argued that only by heavy government regulations can the freedom of speech be preserved. This so-called logic ignores history and turns the Bill of Rights on its head. In fact, it is not government that guarantees the right to speak freely but rather it is constrained from impinging on the rights of citizens. History is replete with examples of government being the limiter of free speech, throttling a natural right. An open and free internet ecosystem assumes and includes the freedom of expression, and all of the rights conveyed via the First Amendment. The argument that such freedom will not exist online but for government control is merely a predicate for government absolute control online. True net neutrality rejects this argument in favor of liberty.

One could hardly imagine something that more correctly described as interstate than the internet. Congress must also be clear that in fact if there is to be an interstate commerce clause at all then the internet is surely where it would apply, and as such that the federal government must define and maintain a uniform federal policy. The clause is intended as a means to keep overly aggressive states from imposing barriers to trade on other states and the citizen of those other states. In this case, balkanized regulatory schemes would lead to a decrease in investment, a downgrade in the online experience, and frustrate the goal of greater broadband deployment.

Simply put, this is an issue that Congress must address. We cannot afford to risk our future of health, communications, entertainment, work and education to those preferring social experiments above social success.

Title II is the wrong path for a variety of reasons if we want an innovative future and economic growth. Thankfully then, the FCC has begun a much-needed process to restore the internet to consumers instead of locking away its potential behind government restriction. Rescinding the Title II classification rules will once again set the future of the internet ecosystem on the right path, benefitting all of those in the ecosystem as well as the economy, creating more jobs and innovation for all citizens.

Sincerely,

Bartlett D. Cleland