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RE: Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992 MB Docket No. 05-311

COMMENTS OF THE COMPETITIVE ENTERPRISE INSTITUTE

The Competitive Enterprise Institute hereby submits these comments on the draft Third Report and Order on the Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition (Cable) Act of 1992. We support this proposal, which would ensure local cable franchising authorities (LFAs) operate in a manner that is consistent with the limitations placed on them by Congress under the Cable Act. Such would subsequently improve the competitive environment in the space of broadband internet service providers (ISPs), in keeping with other significant recent efforts of the current Federal Communications Commission (FCC). We therefore urge the Commission to adopt the Order at the upcoming August 2019 open meeting.

Recently the FCC has taken great strides in clearing away regulatory hurdles to investment in and of deployment of broadband internet networks. The signature item in this forward-thinking agenda is of course 2017's Restoring Internet Freedom (RIF) Order. RIF reversed the FCC's ill-advised attempt to impose the concept of "net neutrality" upon ISPs by reclassifying them as Title II common-carriers under the Communications Act of 1934.

Net neutrality, while it lacks any objective definition, is the concept that all internet traffic should be treated equally by ISPs and no traffic should be prioritized, slowed, or blocked outright. While most-all ISPs voluntarily aspire to this concept, as a legal mandate it is tantamount to an assault on property rights, effectively telling ISPs that they ultimately do not control the networks they own. Therefore, the brief net neutrality experiment did tremendous damage to investment in broadband internet infrastructure.[1] Following RIF, broadband investment has rebounded, internet speeds are up, and home broadband usage is once again rising across the board.[2]

RIF also cleared the way for Fifth Generation or 5G wireless internet technology. The promise of 5G is significantly faster wireless internet speeds transmitting significantly more data.

[1] Patrick Brogan, "Broadband Investment in 2018 Continues Upswing," USTelecom, February 7, 2019. https://www.ustelecom.org/broadband-investment-in-2018-continues-on-upswing/

[2] Ookla Fixed Broadband Speedtest 2019, December 12, 2018. https://www.speedtest.net/reports/united-states/2018/#fixed & Internet/Broadband Fact Sheet, Pew Research Center, June 12, 2019. https://www.pewinternet.org/fact-sheet/internet-broadband/

An indisputable outcome of such technology will be more and more devices connected to the internet. Driverless cars are one frequently cited example. The implication of a world of countless devices with countless functions all connected to the internet is that some internet traffic may indeed need to be prioritized or prevented from interfering with machines in life-or-death situations. Such a reality renders the concept of net neutrality not just outdated but entirely backwards. Therefore, Title II regulation of ISPs served as a major impediment to 5G.

After clearing away this hurdle, the FCC turned its attention on another obstacle to 5G. In September 2018, FCC adopted the Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment Order.[3]

While 5G is the future of wireless technology, wireless is somewhat of a misnomer. All wireless technology does is allow for remote devices to connect to wired networks. Therefore, significant wired infrastructure is required to utilize wireless devices and 5G in particular is dependent on denser wired infrastructure than its predecessors due to fundamental technological differences.

The need to deploy much of this wired infrastructure for wireless networks was seen as a significant revenue source for some cities and other localities, leading to dramatic increases in the cost of accessing public areas and rights of way. FCC Chairman Ajit Pai effectively summarized the problem and how the FCC intervened with the September 2018 order in his statement of approval:

> "[T]here are outliers that are unreasonably standing in the way of wireless infrastructure deployment. So today, we address regulatory barriers at the local level that are inconsistent with federal law. For instance, big-city taxes on 5G slow down deployment there and also jeopardize the construction of 5G networks in suburbs and rural America. So today, we find that all fees must be non-discriminatory and cost-based. And when a municipality fails to act promptly on applications, it can slow down deployment in many other localities. So we mandate shot clocks for local government review of small wireless infrastructure deployments."[4]

The FCC should be commended for both the 2017 Restoring Internet Freedom Order and the 2018 Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment Order. Yet, as we move beyond the ill-conceived approach of net neutrality and seek to facilitate the deployment of broadband internet infrastructure, such as 5G networks, there is a different kind of neutrality that regulators and legislators alike should adopt. Legislation and regulation should, to every reasonable extent, seek to embrace technology neutrality.

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[3] Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, September 27, 2018. https://docs.fcc.gov/public/attachments/FCC-18-133A1.pdf

[4] Statement of Chairman Ajit Pai, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, September 27, 2018. https://docs.fcc.gov/public/attachments/FCC-18-133A1.pdf

Technology neutrality is the idea that businesses should not be subject to different basic standards of regulation based on the technology of the product or service they provide. Despite the name, net neutrality is an example of the opposite of technology neutrality. Under net neutrality, ISPs were not in control of the content that would move across their system, yet websites were still free to block, limit, or prioritize certain content. Both ISPs and websites are technologies that facilitate access to information on the internet, yet net neutrality regulation subjected them to different basic standards that violated technology neutrality.

Unlike net neutrality regulation, the proposed Order in this proceeding is an embodiment of technology neutrality. As mentioned, in September 2018, the FCC moved to limit the ability of state and local governments to stifle the deployment of 5G wireless networks through excessive fines and red tape. While this was a welcome move, it was not the definition of technological neutrality at the time. This is because non-wireless broadband providers also face incredible obstacles from local governments when it comes to deploying and operating their networks. The source of red tape in this instance are LFAs.

LFAs are state or local-level government organizations that, in combination with the FCC, regulate the provision of cable television services in a given state or locality. LFAs routinely abuse this regulatory authority in effectively the same manner as state and local governments did in the 5G sector prior to the September 2018 order. Since LFAs control the ability for cable companies to deploy their networks in a given area, they have used this power to extract revenue and other benefits from cable companies.

Congress sought to limit this abuse by imposing a cap of 5 percent of revenues for LFA franchise fees in the Cable Act. Since then, LFAs have become creative in their rent extraction, including various in-kind contributions. NCTA, the Internet and Television Association, provides many examples of LFA abuse such as the one below, which is particularly illustrative:[5]

> "In addition to requirements to serve schools and public buildings in Minnesota, certain LFAs in that state have required the cable operator to also provide free cable service to municipal liquor stores, waste water treatment plants, arenas, marinas, aquatic centers, golf courses, heritage centers, museums, parks, nature centers, theaters, convention centers, regional airports, and an ice skating warming house."

LFAs have also moved to exert their authority over non-cable products, like broadband internet, that are transmitted over cable networks, imposing duplicative taxes and fees despite the lack of any actual new infrastructure deployment. LFAs are explicitly banned under the Cable Act from regulating broadband internet services, under Section 642(b).

These in-kind demands, duplicative taxes, fees, and other extractions all impose costs upon cable providers that ultimately harm consumers in the same ways the FCC sought to

[5] Comments of the Internet and Television Association, MB Docket No. 05-311, November 14, 2018. https://ecfsapi.fcc.gov/file/1115214612110/Comments%20of%20NCTA%20--%20MB%20Docket%20No.%2005-311%20--%2011.14.2018.pdf

mitigate in the 5G sector. Resources devoted to appeasing one LFA draws resources away from providing cable and broadband services to another community. Abusive LFAs may also divert resources away from their own communities as companies choose not to pay or provide the excessive and unpredictable fees and in-kind benefits. This limits competition in local cable and broadband markets, harming consumers.

Finally, LFA abuse of cable broadband providers may ultimately harm consumers in the 5G sector. Cable companies are actively working to either compete with 5G services or offer their own wireless products across their networks. If LFAs can impose requirements on companies with existing cable networks seeking to offer 5G and other broadband services, these companies will never be able to compete with existing wireless firms, now protected by the FCC's September 2018 order. In that order, the FCC acknowledges the importance of competition within the 5G market. FCC must also acknowledge the importance of new competition within that market as well as competitive pressure from alternative broadband products provided by companies facing LFA regulation.

The Order in this proceeding would go a long way in correcting the above inequities in the broadband market. In short, the Order would count most-all in-kind contributions towards the 5 percent cap on LFA fees. It would also spell out the Cable Act provision, Section 642(b), stating LFA jurisdiction does not extend to broadband internet services. The Order also expands these checks to include state-level LFAs.

We strongly support each of these reforms and clarifications.

Once again, the FCC has done substantial and commendable work over recent years to remove barriers to the deployment of broadband networks. In moving away from the error of net neutrality, FCC should seek to embrace technology neutrality in its continued efforts. To those still without reliable broadband connections or service, it likely makes little difference what technology ultimately connects them to the benefits of the web. Allowing multiple technologies to compete on as level a playing field as possible will make this happen faster. Regulatory principles should reflect this reality. In light of the FCC's efforts to streamline 5G deployment, the Commission should feel compelled to adopt this Order as well.

Respectfully submitted,

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