November 2, 2017

Via Electronic Filing

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

Re: Written Ex Parte, *Restoring Internet Freedom*, WT Docket No. 17-108

Dear Ms. Dortch:

On November 1, 2017, Robert M. McDowell, Chief Public Policy Advisor of Mobile Future, testified before the U.S. House Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, regarding "Net Neutrality and the Role of Antitrust." A copy of his testimony is being submitted for inclusion in the record in the above-referenced docket.

Pursuant to Section 1.1206 of the Commission's rules, this is being filed via ECFS. Please do not hesitate to contact the undersigned with any questions.

Sincerely,

/s/ Margaret McCarthy
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Attachment

STATEMENT
OF
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"NET NEUTRALITY AND THE ROLE OF ANTITRUST"

BEFORE THE
U.S. HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW
UNITED STATES HOUSE OF REPRESENTATIVES

NOVEMBER 1, 2017

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Executive Summary

Mobile Future is an association of cutting-edge technology and communications companies, as well as a diverse group of non-profit organizations, working to support an environment which encourages investment and innovation in the dynamic wireless sector. The mobile Internet is transforming global society. Part of Mobile Future's mission is to promote policies that will enhance the mobile Internet ecosystem, the build-out of next-generation 5G technologies, and the burgeoning Internet of Things.

The Internet is the greatest deregulatory success story of all time. Since it was privatized in the 1990's, it has become the fastest growing disruptive technology in human history as the direct result of bipartisan light-touch regulatory policies. Blossoming in the absence of heavy-handed Depression-era regulations designed for the Ma Bell monopoly, Internet markets, consumers and entrepreneurs alike were protected by nimble and strong antitrust and competition laws that traditionally have been enforced by the Department of Justice (DOJ) and the Federal Trade Commission (FTC). The Federal Communications Commission (FCC) radically departed from that long-standing bipartisan consensus in 2015 when it classified, for the first time, broadband Internet access services under Title II of the Communications Act of 1934, a law designed for phones that were held in two hands.

Reclassification of broadband services as "telecommunications services" under Title II has caused market and regulatory uncertainty, consumer confusion, and inhibited investment. The FCC's action also stripped the FTC of its jurisdiction over broadband markets by triggering the "common carrier exemption." The FCC, however, is poised to reverse its anomalous 2015 *Title II Order* as early as next month. By doing so, it will restore the FTC's jurisdiction and make clear that time-tested antitrust and competition laws will continue to apply thus giving market players in the Internet ecosphere the certainty and freedom to invest, innovate, and

prosper. History has proven that the policing of Internet markets by the DOJ and FTC produces the best results for all involved, especially consumers.

In pursuit of its effort to restore Internet freedom by reversing the *Title II Order*, however, the FCC should also make clear that Internet access services are inherently interstate in nature and that only federal rules apply. In the past few months, a disturbing trend has developed where states and localities have tried to regulate many aspects of the broadband market potentially creating a confusing and innovation-killing patchwork of local laws governing both the economics of the Internet and consumer privacy. The FCC should use its ample statutory authority to preempt states and localities to promote flexible and clear national rules that protect consumers and markets alike.

Introduction

Chairman Goodlatte, Chairman Marino, Ranking Member Conyers, Ranking Member Cicilline, and distinguished Members of the Subcommittee, thank you for having me testify before you today. My name is Robert McDowell.[1] I served as a commissioner of the Federal Communications Commission from June 1, 2006 to May 17, 20131. I am a partner at Cooley LLP and am co-leader of its global communications practice. Earlier this year, I became the Chief Public Policy Advisor of Mobile Future – a coalition of cutting-edge technology and communications companies and a diverse group of non-profit organizations working to support an environment that encourages investment and innovation in the dynamic wireless sector. It is solely on behalf of Mobile Future that I testify today.

Throughout my career, I have supported federal policies that promote an open and freedom-enhancing Internet. These policies were built upon long-standing and bipartisan public policy that insulated the Internet ecosphere from unnecessary regulation. Since being privatized in the 1990's, the Internet proliferated explosively precisely because of light-touch government policies. In short, it blossomed beautifully in the absence of *ex ante* economic regulation, such as Title II of the Communications Act.

During my seven years as a commissioner of the FCC, the Commission conducted two proceedings and issued orders in attempts to expand the regulation of Internet service providers. In each case, I voted against the FCC's orders for a variety of legal and factual reasons. In the lead up to the adoption of the 2015 *Title II Order*, I raised concerns about the harms that would follow the FCC's decision to impose monopoly-era regulation on the competitive broadband market. Unfortunately, our concerns have been borne out, and U.S. markets have witnessed a

[1] Additionally, I am a Senior Fellow with the Hudson Institute.

significant reduction in broadband investment in the two years since the FCC adopted its *Title II Order*.[2]

We all share the same goals of making sure that every American has access to world-class networks – and that the United States continues to lead the world in the race to 5G. We also share the goals of protecting an open and freedom-enhancing Internet. Thus far, the debate has focused on how to do that. Accordingly, I urge policy makers to:

1) Rely upon America's nimble and strong antitrust, competition, and consumer protection laws that are better suited to address any market failure or consumer harm;
2) Return to the bipartisan, light-touch regulatory structure started during the Clinton Administration that fostered the dynamic Internet economy that all Americans benefit from today; and
3) Use the ample statutory authority already provided by Congress to preempt state and local laws that are contrary to federal policy regarding the Internet ecosphere.

I. Existing federal antitrust and consumer protection laws that produced the Internet market Americans benefit from today is more than adequate to regulate the behavior of broadband companies.

As FCC Commissioner Michael O'Rielly stated in 2014, our nation's federal antitrust and consumer protection framework administered by the FTC and DOJ provided the "climate of certainty and stability for broadband investment and Internet innovation."[3] The DOJ and FTC have at their disposal the full panoply of U.S. antitrust laws to address market failures in the broadband industry should they arise. Specifically, the Sherman Act and the Clayton Act would

[2] *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (*Title II Order*).
[3] *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561, 5658 (2014) (dissenting statement of Commissioner Michael O'Rielly).

prohibit Internet service providers from engaging in behavior that harms competition or consumers.

Section 1 of the Sherman Act prohibits contracts "in restraint of trade.[4] Section 2 of that Act prohibits "attempt[s] to monopolize" and "monopolization."[5] While Section 3 of the Clayton Act prohibits exclusivity arrangements that may "substantially lessen competition" or "tend to create a monopoly."[6]

In addition, under current law, the FTC may cure problems under Section 5 of the Federal Trade Commission Act (FTCA), which forbids "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."[7] Supporters of Title II regulations for Internet service providers have argued that network operators could use market power to harm competition in the market, which would ultimately injure consumers. Those potential harms include exclusive dealing arrangements or vertical arrangements, refusals to deal, and raising rivals costs.

For example, hypothetical actions such as an Internet service provider blocking access to a competitor's website or refusing to provide access to a streaming video service that competes with a provider's own video offerings (or, for that matter, limiting the speed at which the competitor's service may be streamed) could subject a broadband provider to sanctions under existing antitrust law.

The FTC has a strong record of carefully evaluating some of the types of behavior addressed by the *Title II Order*. For example, in 2007, the FTC examined broadband Internet competition and issued a *bipartisan* and *unanimous* report that warned of the unintended side

[4] 15 U.S.C. § 1.
[5] *Id.* at § 2.
[6] *Id.* at § 15.
[7] *Id.* at § 45(1).

effects that Title II, or other heavy-handed *ex ante* regulation, could have on Internet service providers and consumers. For example, the report notes that certain arrangements, including exclusive deals and vertical integrations, can benefit consumers.[8] Then-FTC Chairman Deborah Platt Majoras adeptly explained the concern by noting, "policy makers [should] proceed with caution in the evolving, dynamic industry of broadband Internet access, which generally is moving toward more – not less – competition. In the absence of significant market failure or demonstrated consumer harm, policy makers should be particularly hesitant to enact new regulation in this area."[9]

The FTC "has both authority and experience in the enforcement of competition and consumer protection law provisions pertinent to broadband Internet access."[10] Moreover, "the FTCA provisions regarding '[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce'" are especially well suited to deal with harmful network management practices because they "are general and flexible in nature."[11] As then-FTC Commissioner Maureen K. Ohlhausen explained, this flexibility is critical to government intervention in the Internet ecosystem, which historically was characterized by "growth, innovation, pro-competitive efficiencies, significant consumer benefits, largely successful industry, [and] few reported cases of abuse."[12] The flexible and fact-based approach to enforcement permitted under the FTCA is better able to target problems in this environment than other federal regulatory approaches.

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[8] FTC Staff Report at 157-158.
[9] Press Release, Federal Trade Commission, FTC Issues Staff Report on Broadband Connectivity Competition Policy (June 27, 2007), https://www.ftc.gov/news-events/press-releases/2007/06/ftc-issues-staff-report-broadband-connectivity-competition-policy.
[10] FTC Staff Report at 41.
[11] *Id.*
[12] *See Maureen K. Ohlhausen, Telecommunications & Electronic Media – Net Neutrality vs Net Reality: Why an Evidence-Based Approach to Enforcement, and Not More Regulation, Could Protect Innovation on the Web*, 14 Engage 81, 85 (2013).

The FTC and DOJ are already equipped to address the hypothetical harmful practices targeted in the FCC's rule. Furthermore, the DOJ may enforce the law against common carriers. Under the FTCA, however, the FTC may act against an Internet service provider only if its Internet access service is considered to be an "information service"[13] as it was in 2015 before the FCC reclassified Internet access services as a Title II "telecommunications" service. The FTCA expressly prohibits the FTC from taking action against "common carriers." Although the FTC has supported a legislative change to this aspect of the FTCA,[14] Congress has not yet done so. Accordingly, the FCC's 2015 common carrier designation of broadband Internet services entirely removed the FTC from the agency's historical and successful light-touch oversight of the broadband market.[15]

II. Policy makers should reinstate the light-touch regulatory regime that fostered exponential growth in the Internet ecosphere.

The Internet was privatized in the U.S. in the mid-1990s. As of 2015, the ITU reported that there were approximately 3.2 billion global Internet users.[16] Some estimate that there are

[13] An information service is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications…." 47 U.S.C. § 153(20). A Telecommunications service, also known as a Title II service, is "the offering of telecommunications for a fee directly to the public … regardless of the facilities used." 47 U.S.C. § 153(46). Telecommunications is the "transimission, between or among points specified by the user, of information of the user's choosing, without change in the form r content of the information as sent and received." 47 U.S.C. § 153(43). *See also Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Docket No. FCC-02-77, 17 FCC Rcd 4798, at ¶ 40 (2002) ("All information services require the use of telecommunications to connect customers to the computers or other processors that are capable of generating, storing, or manipulating information. Although the transmission of information to and from these computers may constitute 'telecommunications,' that transmission is not necessarily a separate 'telecommunications service.'").

[14] *See, e.g., Legislative Hearing on 17 FTC Bills Before the Subcomm. On Commerce, Manufacturing, and Trade of the H. Comm. on Energy and Commerce*, 114th Cong. (2016) (statement of David C. Vladeck, Georgetown Univ. Law Center).

[15] In addition, consumers may be able to rely on common law remedies to enforce these internal policies including tortious interference with contract, fraud, and breach of posted terms and conditions. *See, e.g., Chin v. RCN Corp.*, No. 1:08-cv-07349 (2011). Thus, the extensive existing legal framework and enforcement mechanisms provide ample protection from any anti-competitive behavior by broadband companies. Under these laws, any problems may be (and were) handled on a case-by-case basis. This practice keeps government involvement at a responsible minimum.

[16] Press Release, International Telecommunication Union, ITU Releases 2015 ICT Figures (May 26, 2015), http://www.itu.int/net/pressoffice/press_releases/2015/17.aspx#.WfIMQWhSyUk.

approximately 3.9 billion users today (or half the global population).[17] Its success as the fastest growing disruptive technology in human history was the direct result of a bipartisan and global consensus to regulate the Internet sector with a light-touch. In June 2010, however, then-FCC Chairman Julius Genachowski proposed to adopt Title II regulations for broadband Internet service providers.[18] Understandably, policy makers from both sides of the aisle reacted with great concern, because they understood that the Internet had grown rapidly under the bipartisan, light-touch regulatory structure created during the Clinton administration.

More than 300 Members of Congress warned the FCC that the Chairman's proposal was circumventing the will of a large, bipartisan majority of Congress. In just one of many examples, seventy-four Democratic Members sent a letter to Chairman Genachowski encouraging him to abandon his proposal: "[t]he significant regulatory impact of reclassifying broadband service is not something that should be taken lightly and should not be done without additional direction from Congress. We urge you not to move forward with a proposal that undermines critically important investment in broadband and the jobs that come with it."[19]

A decade earlier, under the Clinton-era leadership of FCC Chairman William Kennard, the FCC submitted a *Report to Congress* that determined, "[t]urning specifically to the matter of Internet access, we note that classifying Internet access services as telecommunications services could have significant consequences for the global development of the Internet. We recognize the unique qualities of the Internet, and do not presume that legacy regulatory frameworks are appropriately applied to it."[20] Two years later, Chairman Kennard elaborated, "It just doesn't

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[17] World Internet Users Statistics and 2017 World Population Stats, Internet World Stats, http://www.internetworldstats.com/stats.htm (last visited October 26, 2017).
[18] *Framework for Broadband Internet Service*, Notice of Inquiry, 25 FCC Rcd 7866 (2010).
[19] Letter from 74 Members of the House of Representatives to The Honorable Julius Genachowski (May 24, 2010).
[20] *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11540 (1998). That same report concluded "Internet access services are appropriately classed as information, rather than telecommunications, services," because "[t]he provision of Internet access service … offers end users information-

make sense to apply hundred-year-old regulations meant for copper wires and giant switching stations to the IP networks of today…. We now know that decisions once made by governments can be made better and faster by consumers, and we know that markets can move faster than laws."[21] In short, Chairman Kennard and his colleagues unanimously concluded that Title II was inappropriate to regulate Internet access. The Clinton White House came to a similar decision about placing legacy regulations on the Internet, "[w]e should not assume … that the regulatory frameworks established over the past sixty years for telecommunications, radio and television fit the Internet."[22]

The FCC's 2015 *Title II Order* was a dramatic reversal of these long-held policies and has already had a negative effect on innovation and investment on broadband infrastructure. For example, a Wireless Internet Service Providers Association member survey showed that 80 percent of its members "incurred additional expense in complying with the Title II rules, had delayed or reduced network expansion, had delayed or reduced services and had allocated budget to comply with the rules."[23] Additionally, Charter Communications said that it delayed the build-out of its out-of-home Wi-Fi network, because it was concerned that it would not be able to offer this network as a benefit to subscribers.[24] Furthermore, Cox Enterprises has allocated fewer resources to its cable subsidiary because of the heightened investment risk in the communications sector caused by Title II.[25]

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service capabilities inextricably intertwined with data transport. As such, *we conclude that it is appropriately classed as an 'information service."* *Id.* at 11536, 39-40 (emphasis added).

[21] Remarks of the Honorable William E. Kennard, Chairman, FCC, *Voice Over Net Conference: Internet Telephony: America Is Waiting* (Sept. 12, 2000).

[22] The White House, *A Framework for Global Electronic Commerce* (July 1, 1997).

[23] Comments of the Wireless Internet Service Providers Association, FCC Docket WC 17-108 at 14 (filed July 17, 2017).

[24] Comments of Charter Communications, Inc., FCC Docket WC 17-108 at 11 (filed July 17, 2017) (Charter Comments).

[25] Comments of Cox Communications, Inc., FCC Docket WC 17-108 at 2-3 (filed July 17, 2017) (Cox Comments).

Specifically, the *Title II Order's* "general conduct standard" inhibits broadband innovation and investment. Look no further than the previous FCC's treatment of popular free data offerings.[26] After initially praising one Internet service provider's free data product, the FCC inexplicably launched an investigation into free data services,[27] citing its newly-minted general conduct standard.[28] While the current FCC wisely closed the investigation,[29] AT&T points out that there is no certainty that the vague and limitless general conduct standard will not be invoked in the future to "favor[] the interests of *competitors* over those of *consumers*."[30]

This regulatory whiplash, where a new service is praised one day,[31] then threatened the next, created great confusion and uncertainty in the marketplace and demonstrated just how much arbitrary latitude the FCC left itself in the *Title II Order*. As Ericsson pointed out, companies cannot help but be fearful to develop new services or offerings when they may be told, after the fact, that they violated a rule they could not have foreseen being applicable.[32] This uncertainty chills investment in and development of new products and offerings that not only improve consumer experiences, but drive opportunity and adoption for those most in need.[33]

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[26] Zero-rated content is content that subscribers can access without the data consumed being applied to the subscriber's data usage allowance or data cap. Sponsored data arrangements are those that allow an edge provider to offer services to consumers on a zero-rated basis by "sponsoring" the data the consumers use. Because zero-rated data does not count toward a consumer's data allowance or cap, consumers have greater access to different content, with lower costs to access such content. Moreover, networks are encouraged to further expand their investment in broadband networks to support access to the zero-rated content.

[27] *See*, *e.g.*, Letter from Roger C. Sherman, Chief, FCC Wireless Telecommunications Bureau to Kathleen Ham, Senior Vice President, Government Affairs, T-Mobile (Dec. 16, 2015); Letter from Roger C. Sherman, Chief, FCC Wireless Telecommunications Bureau to Robert W. Quinn, Jr., Senior Vice President – Federal Regulatory, AT&T (Dec. 16, 2015); Letter from Matthew S. DelNero, Chief, FCC Wireline Competition Bureau to Kathryn A. Zachem, Senior Vice President, Regulatory and State Legislative Affairs, Comcast Corporation (Dec. 16, 2015).

[28] The general conduct standard prohibits broadband Internet access ervcies from "unreasonably interfering with" or "unreasonably disadvantaging" end users or edge providers. *Title II Order* at 5659-69.

[29] *Wireless Telecommunications Bureau Report: Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero Rated Content and Services*, Order, 32 FCC Rcd 1093 (WTB 2017).

[30] Comments of AT&T Services Inc., FCC Docket WC 17-108 at 58 (filed July 17, 2017) (AT&T Comments).

[31] *See Title II Order* at 5666-67.

[32] Comments of Ericsson, FCC Docket WC 17-108 at 4 (filed July 17, 2017) (Ericsson Comments).

[33] *See*, *e.g.*, Comments of Verizon, FCC Docket WC 17-108 at 13 (filed July 17, 2017); AT&T Comments at 49; Comments of NTCA – The Rural Broadband Association at 12.

Furthermore, the FCC's classification of broadband as a telecommunications service under Title II deterred investment by increasing the level of regulatory uncertainty and the costs of regulatory compliance.[34] As Charter Communications underscored, the "Title II regulatory environment undermines the very private investment and buildout of broadband networks the [FCC] is seeking to encourage."[35] And as the American Cable Association has pointed out, reclassification also made it more difficult for wireless providers to finance their businesses.[36] The "mere threat that the [FCC] may … impose rate regulation" has affected the decision of lending institutions for several companies.[37]

A number of studies have estimated the amount of investment lost since November 2014, when the wireless industry first knew that reclassification under Title II was likely.[38] With respect to mobile, a CTIA study found that investment declined from $32.1 billion in 2014 to $26.4 billion in 2016, a drop of 17.8 percent in only two years.[39] This downturn, which disproportionately affects poor, minority, and rural Americans, will continue to persist under a Title II utility regime.[40] As the National Multicultural Organizations point out, "[h]istory shows that when businesses contract as a result of over-regulation, it disproportionately impacts consumers on fixed or lower incomes, many of whom are people of color," and many of whom

[34] *See*, *e.g.*, Comments of Sprint Corporation, FCC Docket WC 17-108 at 2 (filed July 17, 2017); AT&T Comments at 54; Comments of T-Mobile USA, Inc., FCC Docket WC 17-108 at 7 (filed July 17, 2017); Charter Comments at 9; Comments of Comcast Corporation, FCC Docket WC 17-108 at 8 (filed July 17, 2017); Cox Comments at 2-3; Comments of Frontier Communications Corporation, FCC Docket WC 17-108 at 4-5 (filed July 17, 2017); Ericsson Comments at 4.
[35] Charter Comments at 9; Cox Comments at 2-3.
[36] Comments of the American Cable Association, FCC Docket WC 17-108 at 16-17 (filed July 17, 2017).
[37] *Id*. at 16.
[38] Comments of Hal J. Singer, Ph.D., FCC Docket 17-108 at 1 (filed July 17, 2017).
[39] Anna-Maria Kovacs, Ph.D., CFA, *The Effect of Title II Classification on Wireless Investment*, at 8 (July 2017), http://cbpp.georgetown.edu/sites/cbpp.georgetown.edu/files/Kovacs%20-%20Title%20II%20and%20wireless%20investment.pdf (citing CTIA Annual Report for 2017).
[40] *See* Comcast Comments at 8-9; Comments of the Hispanic Leadership Fund Comments, FCC Docket WC 17-108 at 1 (filed July 17, 2017).

rely only on mobile broadband service to access the Internet.[41] More broadly, according to a study by economist Hal Singer, there was a $3.6 billion drop in broadband investments among ISPs in 2016 alone.[42] The Free State Foundation projected a $5.6 billion reduction in broadband capital investment over 2015 and 2016.[43] And the Phoenix Center, which traces lost investment back to 2010, when then-Chairman Julius Genachowski first considered Title II-like rules, has found that from 2011 to 2015, another $150 to $200 billion of investment was deterred by the potential change in rules.[44]

III. The FCC has ample authority to preempt state and local broadband or broadband-related privacy regulations that are contrary to federal policy, and it should do so.

As a matter of good government and in the interest of protecting an open and freedom-enhancing Internet that enriches consumers lives without confusing them or limiting their choices, the FCC should unambiguously preempt state and local broadband regulations. The Commission would be on solid legal footing if it were to do so.

In numerous statutory sections, Congress authorized the FCC to preempt state laws that hinder the agency's ability to promote federal priorities for interstate services, such as broadband Internet access services. Indeed, Congress established the FCC "for the purpose of regulating interstate and foreign commerce in communication by wire and radio … more effective[ly]" in a centralized authority.[45] The FCC has stated time and time again that wired and wireless broadband Internet access services are inherently interstate services.[46] As the result of the

[41] Comments of The National Multicultural Organizations, FCC Docket WC 17-108 at 4 (filed July 17, 2017).
[42] *Comments of CenturyLink*, FCC Docket WC 17-108 at 11 (filed July 17, 2017) *(*citing Hal Singer, *2016 Broadband Capex Survey: Tracking Investment in the Title II Era* (2016)).
[43] Comments of The Free State Foundation, FCC Docket WC 17-108 at 30 (filed July 17, 2017).
[44] *Id*. at 12-13 (citing George Ford, "Net Neutrality, Reclassification and Investment: A Counterfactual Analysis Net Neutrality, Reclassification and Investment: A Further Analysis, Phoenix Center for Advanced Legal and Economic Public Policy Studies (Apr. 25, 2017)).
[45] 47 U.S.C. § 151.
[46] On October 25, 2017, Verizon submitted a white paper that examines the FCC's authority to preempt state broadband laws. That white paper includes a summary of the principal decisions in which the FCC has defines broadband Internet access service as an interstate service. Verizon, *FCC Authority to Preempt State Laws*, FCC

underlying network architecture and embedded electronics, logic, and protocols, broadband Internet access services are by their nature interstate services. And to ensure that these services can work effectively and efficiently, any regulation must be uniform and national. The alternative, allowing each state and thousands of localities to regulate all or part of the complex and dynamic Internet market, would create a chaotic constellation of disparate and inconsistent regulations with which broadband companies literally could not comply.

To avoid such a confusing and counter-productive scenario, the FCC should use powers already granted to it by Congress to preempt states and localities in pursuit of strong and uniform national rules that protect consumers without confusing them and driving up their costs. The FCC has directly enumerated and specific authority to preempt state and local laws that regulate mobile broadband service providers.[47]

Docket WC 17-108 (filed October 25, 2017) (Verizon White Paper), https://ecfsapi.fcc.gov/file/1025134031053/2017%2010%2025%20Verizon%20FCC%20Preemption%20White%20Paper%2017-108.pdf (noting "*Comcast Corp. v. FCC*, 600 F.3d 642, 646–47 (D.C. Cir. 2010) (quoting 47 U.S.C. § 152(a)); *see also Title II Order* at 5722 n.708 (2015) ("reaffirm[ing] that [broadband Internet access service] is an interstate service for regulatory purposes"); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP–Bound Traffic*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475, 6496 n.69 (2008) ("We have consistently found that ISP-bound traffic is jurisdictionally interstate … the Commission has likewise found that services that offer access to the Internet are jurisdictionally interstate services."); *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5909 (2007) ("[W]e conclude that wireless broadband Internet access service is jurisdictionally interstate."). Indeed, broadband Internet access service is an *inherently* interstate service: It connects Americans from across the country, freely and fluidly crossing state lines, and thus departs entirely from traditional notions of geographically bounded communications services. *See Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22,404, 22,419, 22,424 (2004) (concluding that "[t]he Internet's inherently global and open architecture obviates the need for any correlation between Vonage's … service and its end users' geographic locations" and that the "practical inseverability of other [similar] types of IP-enabled services … would likewise preclude state regulation"); *Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3317 (2004) ("[S]tate-by-state regulation of a wholly Internet-based service is inconsistent with the controlling federal role over interstate commerce required by the Constitution.")).

[47] For example, Section 303 of the Communications Act delegates rulemaking authority to the FCC to define the nature of wireless licenses, including mobile broadband Internet services, and to create rules needed to carry out mandates of the Communications Act. 47 U.S.C. § 303(b), (r). In other words, Section 303 authorizes the FCC to adopt rules to advance federal goals or preempt state and local laws that frustrate the agency's efforts to promote its mobile broadband policies. Similarly, Section 332 of the Communications Act broadly divests states of authority over market entry and terms and conditions of service for wireless offerings. 47 U.S.C. § 332(c)(3)(A).

The FCC also should employ the powers granted it under Section 230(b)(2) of the Communications Act. In that provision, Congress states that it is the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*."[48] Section 230 requires the FCC to take steps to preserve a pro-competitive regulatory structure without the burden of federal or state laws. The FCC should take into account this Congressional mandate and return broadband Internet access services to the light-touch regulatory regime that existed when Congress adopted Section 230 by preempting any state regulation of broadband, including any broadband-related privacy laws.

Absent federal preemption, state laws pose a direct threat to restoring the light-touch bipartisan regulatory framework that allowed the Internet to become the powerful consumer tool it is today. Recent efforts to supplant federal broadband privacy rules with inconsistent state and local privacy rules provide palpable examples of the importance of preempting state broadband and privacy regulations. In 2016, the FCC adopted flawed broadband privacy rules that upended the technology-neutral federal regulatory framework and applied "different regulatory regimes based on the identity of the online actor."[49] Congress wisely voted to nullify the FCC's broadband privacy rules before they went into effect, thus endorsing a uniform, national framework for online privacy. Further action is required to implement the necessary national policy that will best protect consumers and network operators alike. Almost 30 states and localities began drafting inconsistent broadband privacy regulations, a situation which has

[48] 47 U.S.C 230(b)(2) (emphasis added).
[49] *See* Executive Office of the President, Office of Management and Budget, *Statement of Administration Policy: S.J. Res. 34 – Disapproving the Federal Communications Commission's Rule on Privacy of Customers of Broadband Services* (Mar. 28, 2017). *See also* Jon Leibowitz, Letter to the Editor, Kennebec Journal (April 13, 2017), http://www.centralmaine.com/2017/04/13/former-ftc-chairman-collins-right-on-privacy/.

created regulatory uncertainty and potential confusion for consumers. A byzantine patchwork of inconsistent state and local privacy regulations would make operating broadband networks technically impossible, discourage operators from investing in the next generation of broadband networks, slow innovation in the broadband ecosphere, and undermine our global competitiveness. To nip this brewing disaster in the bud, while reclassifying broadband as a Title I information service, the FCC should invoke its statutory authority to preempt any state or local broadband laws, including broadband-specific privacy laws, and allow the FTC to do its job.[50] By taking such action, the FCC will ensure that broadband Internet access services are subject to a light-touch regulatory regime unfettered by state and local laws.

Conclusion

The Internet is the greatest deregulatory success of all time. The long-standing bipartisan and global consensus to maintain light-touch policies caused Internet products and services to be the fastest proliferating disruptive technologies in human history. Consumers and entrepreneurs alike were protected by antitrust and consumer protection laws. Returning to this positive and constructive policy framework, along with strong and clear federal preemption, will keep the Internet open and freedom enhancing. Such action is all the more critical as the wireless industry prepares to take the next great leap forward to the 5th generation networks or 5G.

Thank you again for inviting me to appear before you today, and I look forward to your questions.

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[50] The FCC has used its authority on numerous occasions to preempt state and local laws that are contrary to federal policy. *See* Verizon White Paper at 6-9.