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November 10, 2014

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

Dear Chairman Wheeler:

I believe that we share the same goal of protecting and promoting an open Internet where ideas, commerce, innovation, and competition can continue to flourish. I strongly disagree, however, with the method by which you seek to achieve this goal, namely, through regulation rather than antitrust enforcement. What is more, I am deeply concerned that the particular regulations you are pursuing are burdensome, rest on a fundamental misinterpretation of the Federal Communications Act, are objected to by your fellow Commissioners, and would inevitably trigger a third round of prolonged litigation over their questionable legality. None of this will achieve our common goal of an open, flourishing Internet. Rather than pursue promulgation and implementation of these regulations, the Federal Communications Commission (FCC) should rely on our nation's existing and effective antitrust laws and antitrust enforcement agencies to protect the Internet.

We and hundreds of millions of Americans share an appreciation for the Internet as it exists today. In a remarkably short span of time, the Internet has grown from a small network connecting a few universities to one that reaches into nearly every American home and across the globe, providing an unprecedented engine of economic growth and a platform for the robust exchange of commerce and ideas. While it began as a medium to transmit simple text and images, it has become a global network that can deliver real-time, high-definition video and audio, facilitate myriads of services, and generate over a trillion dollars in commerce and economic productivity. Clearly, the Internet deserves not only our attention, but our protection.

To best safeguard the future of the Internet, it is important to recognize the history of its growth. The staggering explosion of the Internet's reach and technological development has occurred in a deregulatory environment. Importantly, at no point in time during this period, or ever, have there been legally enforceable "net neutrality" regulations. This is a point that bears repeating. The Internet has flourished not because of regulations, but due to their absence.

Given the success of a deregulatory approach to the Internet, it is difficult to understand either a need or justification for regulation now. Notably, the FCC has failed to perform a single, peer-reviewed study examining potential market failures that result in discriminatory treatment that might best be rectified by a regulatory response. Simply put, it is not clear what current, harmful activity by Internet market participants the proposed FCC regulations would effectively remedy. Nevertheless, there are some who advocate for imposing an onerous, and potentially decades-old, regulatory structure on the Internet. Foisting an enormous regulatory burden on one of the nation's leading economic drivers without clear evidence of market failures that regulations could cure seems not only unwise but reckless.

Not only are the FCC net neutrality regulations without factual or evidentiary support, but they lack legal merit as well. The courts have struck down two previous attempts by the FCC to regulate net neutrality, finding that the FCC was acting outside its statutory authority.[1] In the most recent decision by the United States Court of Appeals for the District of Columbia, the majority opinion bluntly stated "[w]e think it obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers."[2] Yet, the FCC is considering whether to do just that. I do not believe that issuing unwarranted and legally deficient regulations is the best method by which to achieve an open and competitive Internet.

That is not to say that we should stand by and allow companies to engage in discriminatory or anticompetitive activities. Rather, I believe that the principles of "net neutrality" can be best achieved through the vigorous application of the antitrust laws. Strong enforcement of the antitrust laws can prevent dominant Internet service providers from discriminating against competitors' content or engaging in anticompetitive pricing practices. Furthermore, antitrust laws can be applied uniformly to all Internet market participants, not just to Internet service providers, to ensure that improper behavior is policed across all corners of the Internet marketplace.

The House Judiciary Committee recently conducted a hearing to examine whether antitrust law or regulation is more effective at protecting consumers and innovation on the Internet. Witnesses, including a current Commissioner of the Federal Trade Commission and a former Commissioner of the FCC, testified that the antitrust laws are better suited to police anticompetitive and discriminatory conduct, if and when it occurs.[3] Witnesses also pointed to the fact that regulation was unsuccessful at preventing anticompetitive conduct from occurring during the formation of the analogous railroad and long-distance telephone networks.[4] In fact, it was antitrust enforcement, not regulation, which ultimately introduced competition into the long-distance telephone market. The successful break-up of the long-distance telephone monopoly under antitrust laws was preceded by decades of ineffective and failed efforts by the FCC to

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[1] *See Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010); *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).
[2] *Verizon v. FCC*, 740 F.3d 623, 651 (D.C. Cir. 2014).
[3] *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).
[4] *Id.*

introduce competition through regulation into the long-distance market.[5] It is no coincidence that extraordinary competition in this market and the inception of the dynamic Internet marketplace occurred after effective antitrust enforcement.

The above informs and reinforces my belief that strong antitrust enforcement is superior to regulation of the Internet because antitrust law affords a number of benefits relative to regulation. Antitrust law and the standards applied by the courts have developed, evolved, and been refined over decades. In comparison, new regulations contain untested definitions and standards, which would be interpreted and enforced by a constantly rotating Commission and finally resolved only over time in the courts.

Antitrust law also is applied uniformly and governs the conduct of all participants in the Internet marketplace. Regulations would apply only to a select number of entities.

Antitrust law fosters a competitive environment where innovation flourishes and businesses are free to experiment with new strategies, so long as they are not anticompetitive or discriminatory. Regulation substitutes the free will of the market with the judgment of a government agency, which history has demonstrated often results in the suppression of innovative and competitive forces to the ultimate detriment of the consumer.

Antitrust law prosecutes conduct once it occurs, by determining on a case-by-case basis whether parties actually engaged in improper conduct. Moreover, the threat of antitrust enforcement -- with its possibilities of treble damages and targeted, injunctive relief -- surgically discourages anticompetitive conduct before it occurs. Regulation, by contrast, is a blunt, "one-size fits all" approach that creates a burden on all regulated parties regardless of whether they are acting unlawfully. Oftentimes, the cost of this regulation is ultimately borne by the consumer.

Antitrust law violations may be brought by private parties or enforcement agencies equipped with lawyers and economists who have decades of experience policing anticompetitive conduct. Regulatory violations, however, typically may be pursued only by a select group of defined parties and the regulatory agency. Notably, the FCC has only a single administrative law judge.

Both of the relevant antitrust enforcement agencies have separately issued statements indicating a preference for the use of the antitrust laws over regulation when policing anticompetitive conduct on the Internet. The Department of Justice has stated that "[t]he FCC should be highly skeptical of calls to substitute special economic regulation of the Internet for free and open competition enforced by the antitrust laws."[6] Similarly, the Federal Trade Commission has warned that "[p]olicy makers should be wary of calls for network neutrality regulation simply because we do not know what the net effects of potential conduct by broadband providers will be on consumers, including, among other things, the prices that consumers may pay for Internet access, the quality of Internet access and other services that will

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[5] *Id.* (testimony of Bruce M. Owen).

[6] U.S. Dep't of Justice, *In the Matter of Broadband Industry Practices*, WC Docket No. 07-52 (Sept. 6, 2007), available at http://www.justice.gov/atr/public/comments/225767.pdf.

be offered, and the choices of content and applications that may be available to consumers in the marketplace."[7]

The antitrust enforcement agencies are not alone in their opposition to regulation of the Internet. Congress has expressly stated, in bi-partisan fashion, that it is the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet … unfettered by Federal or State regulation."[8]

As you continue to reflect on whether regulation is necessary to protect the Internet, I encourage you to review closely the history of the Internet, the views of your fellow Commissioners, the preferences of Congress and the antitrust enforcement agencies, and our existing national policies.

Rest assured, the Committee on the Judiciary will continue its commitment of protecting an open Internet, including consideration of whether legislative action is necessary to ensure that antitrust law is the preferred method of enforcement, consistent with the views of the antitrust enforcement agencies and our stated national policy. Furthermore, the Committee will continue to examine whether the antitrust laws require amendment to account for the rapidly evolving nature of the Internet.

Sincerely,

Bob Goodlatte
Chairman
House Committee on the Judiciary

cc: Commissioner Mignon Clyburn
Commissioner Jessica Rosenworcel
Commissioner Ajit Pie
Commissioner Michael O'Rielly

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[7] Fed. Trade Comm'n Staff, *Broadband Connectivity Competition Policy* (June 2007), available at http://www.ftc.gov/sites/default/files/documents/reports/broadband-connectivity-competition-policy/v070000report.pdf.

[8] 47 U.S.C. § 203(b)(2).