

THE HON. ROBERT M. MCDOWELL

Questions for the Record from the Sept. 17, 2014 Judiciary Committee Hearing: “Why Net Neutrality Matters”
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ATTACHMENT 1—MEMBER REQUESTS FOR THE RECORD

The Honorable Patrick Leahy

1. You testified at the hearing that consumers could rely on contractual commitments in their service agreements, in which you claim that most major broadband providers pledge to protect Internet openness and freedom. You noted that such contracts are enforceable by state and federal law. What specific contractual requirements do these pledges create for broadband providers? How common is it for contracts between consumers and broadband providers to be subject to mandatory arbitration? What would protect consumers in the event that broadband providers altered the terms of their contracts to no longer cover open Internet principles?

Thank you for the opportunity to expand upon my view that broadband providers have made enforceable commitments to Internet openness and freedom. Major broadband providers have made specific commitments to their customers to protect Internet openness and freedom. For example, Verizon promises users that they “can access and use the legal content, applications, and services of your choice, regardless of their source” on “any of our Internet access services, wireline or wireless,” “so long as they are legal and do not harm our networks or the provision of Internet access service, facilitate theft of service, or harm other users of the service.”¹ Similarly, Comcast commits to providing its customers with “full access to all the lawful content, services, and applications that the Internet has to offer.”² AT&T assures customers that it “does not favor certain Internet applications by blocking, throttling or modifying particular protocols, protocol ports, or protocol fields in ways not prescribed by the protocol standards.”³

Consumers may rely on these commitments. Current legal regimes, including the Federal Communications Commission’s transparency rule and generally applicable antitrust and consumer protection laws can fully address any issues that might emerge. Indeed, the Federal Trade Commission has built expertise over many years protecting consumers in the Internet and broadband space. This oversight, coupled with market accountability, protects consumers.

You inquire about arbitration clauses, which are often included in agreements between broadband providers and their customers.⁴ The presence of arbitration clauses does not undermine consumer protections in the area of Internet openness. Agreements to arbitrate

¹ See *Verizon’s Commitment to Our Broadband Internet Access Customers*, Verizon, http://www.verizon.com/about/sites/default/files/Verizon_Broadband_Commitment.pdf (last visited Oct. 1, 2014).

² See *Frequently Asked Questions About Network Management*, Comcast, <https://customer.comcast.com/Pages/FAQViewer.aspx?seoid=Frequently-Asked-Questions-about-Network-Management#manage>, (last visited Oct. 1, 2014).

³ See *Broadband Information*, AT&T, <http://www.att.com/gen/public-affairs?pid=20879>, (last visited Oct. 1, 2014).

⁴ See, e.g., *Comcast Agreement for Residential Services*, Comcast, at ¶ 13, http://cdn.comcast.com/~Media/Files/Legal/Subscriber%20Agreement/CustomerAgreement_ENG.pdf?vs=7 (last visited Oct. 1, 2014); *Verizon Online Terms of Service*, Verizon, at ¶ 18, https://my.verizon.com/central/vzc.portal?_nfpb=true&_pageLabel=vzc_help_policies&id=TOS (last visited Oct. 1, 2014); *Terms and Conditions*, Windstream, at ¶ 10, <http://www.windstream.com/Terms-and-Conditions/> (last visited Oct. 1, 2014).

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provide an efficient and effective venue for resolving disputes; they do not extinguish substantive rights and would not vitiate providers’ commitments.

Providers’ commitments, market pressure, and regulatory oversight provide powerful incentives to ensure that customers continue to enjoy full access to the open Internet.

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The Honorable Mike Lee

1. At the Committee’s hearing, you suggested that industry groups advocating net-neutrality regulation should be careful what they wish for. Could you give a concrete example of what you mean?

Thank you, Senator, for the opportunity to elaborate. Creating a new body of law in the Internet ecosystem may fit the short-term business goals of some companies that want to gain a competitive advantage or offload costs to others by regulating their rivals, but history teaches us new rules will likely result in only more expansive regulation. Indeed, it is not difficult to imagine a continued expansion of regulatory powers to encompass the entire Internet ecosystem, including not only broadband networks, but content and applications as well. In short, as Professor Adam Thierer has observed many times, “regulation only grows.”

Proposed net neutrality rules may very well eventually ensnare all aspects of the Internet marketplace. The reason for this is simple: innovation and consumer demand are blurring the lines between what used to be clearly defined legal and regulatory silos between network operators (such as phone, cable and wireless companies) and “tech” companies, both of which offer “information services”—such as computer processing and storage processing—as well as content and applications. Market analysts call this phenomenon “convergence.”

Many companies that may look like pure network operators, such as cable, phone and wireless operators, offer a combination of transmission as well as information services, including content, applications and other value-added services. At the same time, companies that may look like pure content and application providers have state-of-the-art delivery networks that provide substantially similar types of transmission—or delivery—functions as those offered by network operators. In short, the distinction between information service providers and “telecommunications” service providers has all but disappeared in the ever-evolving all-IP world.

Examples of this convergence are “tech” companies that offer e-readers, resold content (such as books) to consume on e-readers and resold wireless connectivity to deliver the content to the e-reader. Proposed net neutrality rules could easily be interpreted to give the FCC the power to regulate all of the above as it becomes increasingly difficult for bureaucrats to parse with surgical precision the differences between transmission and information services. Accordingly, the entire package of products and services could end up being regulated.

Being in this position is partly due to the fact that the Communications Act of 1934 is now more than 80 years old. The New Deal Congress that wrote it did not envision the amazing innovations we have today or how they would scramble and blur the neat little silos of yesterday’s technologies. From a consumer’s perspective, is a “tech” company offering transmission services like a telecom company? Yes. Is a telecom company offering content and applications like a “tech” company? Yes. The logic flowing from these realities provides the basis for treating *all* such companies the same under proposed net neutrality rules. As companies start to “look” more alike, decisions to regulate one company, but not another, may start to be made more on political grounds than the facts and law. Uncertainty will abound as a result, and the entire Internet ecosystem will become more regulated. As I mention in my filed testimony, for a glimpse into this possible future here in America, look to recent actions by regulators and

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courts in Europe which view “Internet companies” as one category to be regulated more heavily by the day.

Rather than creating a new breed of uber regulations for the Internet, Congress should re-write and modernize our laws to focus on preventing consumer harm rather than deciding whether or not to regulate based on antiquated early-20th Century notions.

2. Do you agree with Dr. Eisenach’s testimony that FCC net-neutrality regulations may encourage rent-seeking behavior?

Yes.

3. Apart from the net-neutrality regulations discussed at the hearing, I would like to ask you about a related subject concerning the future of the Internet: the transition of oversight of the domain name system from the U.S. National Telecommunications and Information Administration to the independent Internet Corporation for Assigned Names and Numbers (ICANN).
 - a. A number of groups and individuals have expressed concerns with the Administration’s vague announcement that it would not renew its contract with ICANN—and that ICANN must implement a new mechanism, built on a multi-stakeholder model, that maintains the openness of the Internet. Some of these groups have proposed a minimum set of protections that should be in place before the United States agrees to relinquish its oversight. What protections do you believe ICANN should implement before the United States relinquishes its oversight, and why are such protections necessary?
 - b. If the transition is not completed in a thoughtful way, is there any potential for other governments or intergovernmental organizations to hijack the Internet and threaten its openness?
 - c. In your opinion, assuming adequate protections are in place, will the proposed transition create a more open and freedom-enhancing Internet?

Thank you for the opportunity to answer this question. By way of background, the IANA functions contract that was renewed with ICANN in April of 2013 is in place to ensure the technical functionality of any domain name address that is entered into the root zone. The purpose is a simple function of cross checking that the technical information is accurate and will not harm any other information by being placed onto the A root file with a third party validation. It’s meant to be a technical security check and nothing else.

Over the years, the U.S. Department of Commerce has done an excellent job of keeping this function purely technical. Throughout both Republican and Democratic administrations, the U.S. Department of Commerce has ensured that the IANA function remain purely a technical - and not a political - function.

Additionally, as a general matter, further privatization of Internet governance functions is also a principle that has been embraced by Republican and Democratic administrations over the years. In that spirit, the key to the long-term success of this proposal is whether ICANN can be kept free from governmental and multilateral manipulation and continue in the *non-governmental* “multi-stakeholder” tradition that has served the Internet so well since it was privatized in the early 1990’s. The plan that is put in place as the replacement to the current IANA function

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should have the same rigorous technical standard applied to all applications for A root entry. The IANA function should always be insulated from political agendas whether they are domestic or foreign. Furthermore, ICANN must have a viable and long-term accountability plan and effective structure in place to prevent direct and indirect influence from governments or manipulation by some “civil society” groups that may, in reality, be working on behalf of governments and/or multilateral or intergovernmental organizations. The Department of Commerce and the Department of State have said repeatedly that they share these goals. Nonetheless, the details of executing the proposed transition will determine whether it is a long term success or failure.

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The Honorable Chuck Grassley

1. Proponents of net neutrality claim that if we want broadband Internet access to operate in a manner that preserves the Internet’s open character, then the best approach is to establish that expectation in advance through regulation.
 - a. Do you agree with this approach? Will regulation-before-the-fact preserve and promote the Internet’s openness better than, let’s say, targeting an actual market failure or anti-competitive behavior that has occurred?

Thank you, Senator, for the opportunity to discuss this issue further. At the outset of this debate, it is important to note that today’s Internet is the greatest deregulatory success story of all time. The Net has proliferated beautifully precisely *because* government largely kept its hands off of it. It grew and evolved in the absence of economic regulation, including net neutrality rules. At the same time, nimble and long-standing consumer protection and antitrust laws were in place to deter, or cure, anticompetitive behavior that may harm consumers. To date, there has never been evidence of any systemic market failure in the Internet access market. This inconvenient fact is perhaps why net neutrality regulation proponents have resisted conducting a *bona fide*, peer-reviewed market study of the Internet access market. Such a study would likely show that there is no market failure that requires a government “cure.” In short, nothing is broken that needs fixing.

Creating a new and unnecessary body of law in the form of *ex ante*, or before-the-fact, regulations would create tremendous uncertainty as engineering and business decisions became politicized by unelected bureaucrats at the FCC. This scenario would create a “mother-may-I” regulatory regime where innovators are forced to seek government permission before developing new products and services. The lightning-fast pace of innovation in the Internet sphere would slow to a crawl. The end result would be less investment and innovation and fewer choices for consumers.

Targeting actual market failure and consumer harms through existing laws is a far better approach and has worked tremendously well thus far in the Internet ecosystem. Let’s let history be our guide and stick with what has worked rather than creating a risky new government scheme.

- b. In a dynamic, ever-changing environment such as the Internet, is there a greater justification for *ex ante* regulation as compared to *ex post* enforcement?

No. As I state above and in my written and spoken testimony, trying to predict how the constantly changing Internet economy will evolve is impossible. This is true for entrepreneurs, and even more so for regulators. Rather than trying to guess where markets are headed through *ex ante* or “mother-may-I” industrial policy-style regulation, the public policy approach should be to examine whether concentrations of market power exist, whether that power is being abused and whether consumers are being harmed as a result. Conducting periodic peer-reviewed market studies, and putting them out for public comment, would better inform policy makers to determine whether they should act

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in the first place. In the meantime, policymakers and consumer protection agencies should take an inventory of the myriad laws that exist at both the state and federal levels to combat potential anticompetitive behavior in the Internet sphere. Sticking with what has worked so well in the complex Internet marketplace (a hands-off approach by governments, relatively unfettered opportunities to innovate, invest and experiment plus a reliance on the certainty of *existing* consumer protection and antitrust laws) has allowed for a nimble, positive and constructive approach to making sure nothing “breaks” in this space.

2. I asked this question at the hearing, but would like you to give a more detailed response in writing. It has been argued that antitrust analysis is purely a numbers game that doesn’t take into account important non-economic values.
 - a. Do you agree? Does an antitrust analysis only consider financial and economic values, or can it, in fact, constitute a broader consumer welfare-based analysis that looks at other consumer values?

Competitive markets unfettered by unnecessary government regulation are the best producers of positive and constructive consumer welfare and societal benefits. Allowing for investment, innovation and experimentation is what best serves consumers. As a result, especially in the larger Internet marketplace, it has never been a better time to be a consumer than today. Consumers, even in the poorest countries, have more access to more information than at any other time in human history. Consumer welfare has skyrocketed as a result.

Dramatic increases in global consumer welfare are especially obvious when we look at how the mobile Internet is affecting the basic needs of people across the globe. Farmers are able to find buyers for their products without taking the risk of hauling them to markets in search of buyers who may never materialize. Parents are able to find potable water for their families. Millions are able to open mobile online bank accounts for the first time in the history of their families. Teachers are able to access the best information, online courses and teaching methods online to the benefit of their students. And people suffering under repressive regimes are able to access information to better learn about ideas that promote freedom and democracy. These are just a few examples of the social benefits produced by free markets. The mobile Internet in particular has enjoyed such tremendous success precisely because entrepreneurs have had the freedom to take risks without having to ask the government for permission. Laws cannot mandate innovation, nor can industrial policy. Only unfettered markets can produce the wonderful explosion of entrepreneurial brilliance, consumer welfare and societal benefits we have enjoyed in the Internet marketplace.

In short, if markets are allowed to flourish in the absence of unnecessary, cumbersome and confusing government rules, consumers will have access to more products and services at lower prices. This virtuous cycle produces far more consumer value and societal benefits than any industrial policy or law could ever envision. Use of antitrust

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and consumer protection laws keep markets competitive thus helping to promote consumer welfare and other societal values.

3. Some proponents of net neutrality argue that antitrust law is “too slow” to adequately deter and remedy anti-competitive behavior, particularly those behaviors that hurt small startup companies. Do you agree with this? Is a regulatory framework necessary to protect the rapid and dynamic nature of the Internet startup marketplace?

As a threshold matter, it is important to note that, since its inception, the Internet ecosphere has operated—and flourished—under *existing* laws that did not include net neutrality regulations. The barriers to entry to be a start-up in the Internet marketplace are extremely low. As a result, thousands of Internet-related start-ups sprout each year. At the same time, proponents of net neutrality regulations have spent the past decade trying to get the FCC to issue rules that have been largely struck down by the appellate courts twice. During this time, several antitrust cases could have been brought, and resolved, if there were any evidence of market failure (which there is not). Accordingly, it would appear that following the antitrust and consumer protection law path would be speedier and more effective than untested *ex ante* regulation/industrial policy.

On that note, the Federal Trade Commission (FTC), which has statutory powers in both the antitrust and consumer protection realms, can act at the same pace as the FCC. So can state attorneys general, consumer advocates and trial lawyers—all of whom are poised to act if Internet service providers were to act in an anticompetitive manner.

Not only is a new regulatory regime not needed, but as I testified, new rules could cause unintended consequences and uncertainty that actually *harm* start-ups. Let’s stick with what has worked so well for start-ups: existing law.

4. It has been claimed that we have had a *de facto* net neutrality policy regime for the past 20 years. Do you agree with this observation? Why or why not?

Such novel claims are clever, but they are not factually true on their face. A complete answer would hinge on how one is defining “net neutrality,” a term that is about a decade old. The definition of “net neutrality” seems to morph daily depending on whose interests are served by a new definition. In short, net neutrality rules did not exist at the time the FCC first attempted to enforce an unenforceable policy statement in 2008, over my dissent. That attempt was overturned by the DC Circuit. Prior to 2010, the Internet blossomed under pre-net neutrality law.

If that claim is supposed to mean that laws have been in place to prevent Internet service providers from acting in anticompetitive ways that could harm consumers or rivals, such as antitrust and consumer protection laws, then yes, public policy has been in place to protect an open Internet.

If that claim is supposed to mean there has never been evidence of systemic failure in the Internet access market due to existing laws then yes, an open Internet has existed since it was privatized in the mid-1990s *due to market forces and laws that pre-date net neutrality rules*.

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What is not true is the myth that once upon a time Internet access services were regulated as common carriage under Title II of the Communications Act of 1934. In my prepared testimony I included a letter to then-House Energy and Commerce Committee Chairman Henry Waxman from May of 2010 that outlines the history of the classification of Internet access services in detail.

5. It has been claimed that the Internet needs “basic rules of the road to ensure that it remains open.” Do you agree with this sentiment? Would adopting clear rules provide marketplace certainty and promote investment? If so, what rules specifically should we adopt?

As outlined in my prepared and spoken testimony, I disagree with this assertion. In short, existing antitrust and consumer protection laws are in place to provide more than adequate and nimble “rules of the road” for the complex and dynamic Internet marketplace. Proof of my assertion can be found in the history of growth in the Internet economy—unprecedented growth that has occurred in the absence of prescriptive “rules of the road.”

6. How do you respond to the claim that in the absence of net neutrality regulations, freedom of speech and expression, freedom of association, and the First Amendment itself, will be threatened? How do you respond to the claim that if the FCC does not adopt net neutrality rules, we’ll create an Internet of have and have-nots and certain groups will be left behind?

As discussed in detail in my December 21, 2010, dissent against the FCC’s “Open Internet” Order, which is included as an attachment to my filed testimony, freedom of speech and investment abound in the Internet space without new rules. Broadband build out and adoption proliferated wonderfully without industrial policy from the government or net neutrality rules. In fact, Internet access is the fastest penetrating technology created by humans in modern times. Market forces are responsible for this success, not government mandates.

As a separate matter, also as discussed in my 2010 dissent and other attachments in my written testimony, as a matter of constitutional law “censorship” involves the government muting, amplifying or “balancing” speech on private platforms, even if it is done in the name of “free speech.”⁵ The act of private parties shouting each other down is not censorship because no government action is involved.⁶ In that constitutional context, the market-created open Internet has done more to lower barriers to entry for speakers, and promote the freedom of expression, than any invention since Gutenberg’s 15th Century printing press. On the American Internet, free speech is abundant and thriving. Furthermore, having more speech on the Net is good for the businesses of ISPs as well as app and content providers. More traffic on the Internet translates into more revenue for Internet-related companies. In the meantime, existing laws protect the free flow of information on the Net sparking a virtuous cycle.

7. Some net neutrality proponents argue that without government regulation, certain content providers may be prohibited from getting their content online. Do you agree or disagree with this statement and why?

⁵ *United Bhd. of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 832 (1983).

⁶ *Id.*

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I disagree. First, no evidence exists that shows that lawful content is prohibited from being placed online in a systemic or anticompetitive way. If that were to happen, competition, consumer protection and antitrust laws, not to mention tortious interference with contract, fraud, Section 5 of the Federal Trade Commission Act and many common law causes of action could be brought against ISPs if they were to exclude or block content under most circumstances. If net neutrality proponents believe content providers are being harmed, then they should support the concept of the Commission conducting a *bona fide*, peer-reviewed market study; yet they don't.

8. It has been said that there is a “strong argument that Internet access is a ‘telecommunications service’” within the definitions of the Communications Act.
 - a. Do you agree with this assertion? Why or why not?

I strongly disagree with that statement. As stated above, please refer to my May, 2010 letter to Rep. Henry Waxman outlining why Internet access is, and always has been, an “information service.”

- b. How would classifying Internet access as a Title II “telecommunications service” result in the regulation of the larger Internet ecosystem? Are you concerned that it could possibly ensnare other things like content, applications or edge providers? How could that impact the Internet?

Thank you, Senator, for the opportunity to elaborate. Creating a new body of law in the Internet ecosphere may fit the short-term business goals of some companies that want to gain a competitive advantage or offload costs to others by regulating their rivals, but history teaches us new rules will likely result in a continued expansion of regulatory powers to encompass the entire Internet ecosystem, including not only broadband networks, but content and applications as well. In short, as Professor Adam Thierer has observed many times, “regulation only grows.”

Proposed net neutrality rules may very well eventually ensnare all aspects of the Internet marketplace. The reason for this is simple: innovation and consumer demand are blurring the lines between what used to be clearly defined legal and regulatory silos between network operators (such as phone, cable and wireless companies) and “tech” companies that offer “information services”—such as computer processing and storage processing—as well as content and applications. Market analysts call this phenomenon “convergence.”

Companies that used to look like pure network operators, such as cable, phone and wireless operators, now offer a combination of enhanced and transmission services as well as content, applications and other value-added services. At the same time, companies that used to look like pure content and application providers now have state-of-the-art delivery networks that provide substantially similar types of transmission—or delivery—functions as those offered by network operators. In short, the distinction between “enhanced” service providers and “telecommunications” service providers has all but disappeared in the ever-evolving all-IP world.

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