

Lowell McAdam
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March 27, 2015

The Honorable John Thune
United States Senate
511 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Bill Nelson
United States Senate
716 Hart Senate Office Building
Washington, DC 20510

The Honorable Fred Upton
United States House of Representatives
2183 Rayburn House Office Building
Washington, DC 20515

The Honorable Frank Pallone
United States House of Representatives
237 Cannon House Office Building
Washington, DC 20515

Dear Members of Congress:

For the past few weeks, telecom and technology issues have been prominent in the news, but unfortunately for all the wrong reasons. Coverage has not been about a thoughtful, substantive dialogue on the best long-term policy for one of the most important and successful sectors of the US economy. Rather, the focus was on how politics trumped policy, how the reversal of 20 years of successful bipartisan policymaking and light touch regulation of the Internet allegedly took place outside of public view, and how a company with a market cap of \$33 billion tried to take advantage of vaguely written regulations to claim a \$3.3 billion subsidy from taxpayers that was intended for small businesses.

At its root, these are all symptoms of a problem: the existing legal regime and its accompanying regulatory processes are outdated and broken. Congress last established a clear policy framework almost 20 years ago, well before most of today's technology was even developed. As a result, regulators are applying early 20th century tools to highly dynamic 21st century markets and technologies. Inefficiencies and collateral damage are inevitable. It is time for Congress to re-take responsibility for policymaking in the Internet ecosystem.

Even the best-designed statutory and regulatory frameworks result in unintended consequences as stakeholders leverage ambiguities to advance their agendas, seek to use regulation to hinder their rivals, and create new business models based on regulatory inefficiencies. But the drastically outdated policy framework in the Internet ecosystem has pushed such unintended consequences to absurd new levels. The past few weeks alone have provided two high-profile examples.

First, the recent auction of AWS-3 spectrum showed once again the tremendous demand for this resource and the need for the US Government to make more spectrum available to continue to fuel the growth of the mobile economy. This success, however, has been overshadowed by controversy over attempts to exploit the FCC's "designated entity" rules. This program, if used correctly, has merit and gives smaller companies and diverse entrepreneurs an opportunity to enter into new business opportunities. This is a worthy goal.

Unfortunately, some companies tried to game the FCC rules to abuse the process. DISH, a \$33 billion company, used two "designated entities" to win large swaths of spectrum around the country and claim a taxpayer-funded 25 percent discount. In the end, despite not having announced any plans to use this spectrum to serve customers, DISH bought 44 percent of the licenses while saving more than \$3 billion thanks to the designated entity credits. Over the years, the FCC has repeatedly granted DISH's requests to make its spectrum more useful, and therefore more valuable, by allowing, for example, satellite spectrum to be converted to terrestrial use, converting uplink spectrum to downlink, and extending build-out deadlines. Yet, despite now being one of the largest spectrum holders in the country, DISH has not invested one dollar or created a single job by building networks or using this spectrum to serve customers. Meanwhile, the FCC is contemplating rules for the upcoming incentive auction that will intentionally withhold spectrum from the very companies that are investing, creating jobs and serving customers. Congress should ensure that our spectrum policies are aligned with the overall economic interests of the country and are not subject to abuse to serve the interests of particular entities.

Second, the FCC recently released its lengthy order reclassifying broadband Internet as a telecom service and imposing an expansive set of regulations on those services for the first time, thereby setting off debate about the consequences of those regulations. It is worth pondering how what began several years ago as a single page of principles supported and followed by every major ISP morphed into a 313 page order with almost 1800 footnotes that will spawn years of uncertainty and litigation. This uncertainty is all the more troubling in this case because it is both unnecessary and unusually consequential.

The broadband and mobile markets are America's greatest ongoing success stories: 20 years of bipartisan light-touch policy consensus has led to more than \$1.2 trillion in private investment, resulting in a transition from 128 kilobit dial-up connections and analog wireless voice networks in the late 1990s to today's near-ubiquitous 4G mobile data coverage and fixed broadband networks capable of streaming simultaneous HD movies. The FCC claimed it was addressing concerns about an open Internet, something that Congress could – and can – address with clarity and finality in a two-page bipartisan bill. Instead, the FCC went far beyond open Internet rules, engaging in a radical and risky experiment to change the very policy that resulted in the United States leading the world in the Internet economy. The hundreds of pages of the FCC's order lead to far more questions than answers; when asked about the regulations' "general conduct" rules, even FCC Chairman Wheeler admitted, "[w]e don't know where things will go next."

There is a better way. It is time for Congress to return to its rightful place and set policy. In the short term, Congress should come together on a bipartisan basis and pass a bill that protects the open Internet in a way that avoids the collateral damage that will result from the FCC's actions. The courts inevitably will find that the FCC's actions were improper, or a future FCC will reverse course again, so Congress will have to address this issue one way or another, sooner or later. It is better to do so now, proactively.

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More broadly, it has been two decades since the last meaningful update of the laws governing the communications sector. That's too long. In that time, technology and markets have gone through several cycles, while law and policy have stood still. The spectacle of the open Internet rules is a prominent symptom of this neglect. Since the beginning, the disagreement has always been about the underlying *legal jurisdiction* for such principles, not the principles themselves. This tension arose from the FCC applying rules designed for 1930s technology and markets. A 21st century policy framework could address these issues.

The Internet and its applications represent our greatest promise for economic growth and now account for nearly one-sixth of the country's economy. The United States is the global leader in the communications and Internet economy. But all this is at risk. It is time for Congress to assert its longstanding role of setting, in a bipartisan fashion, public policies for the communications sector that both protect consumers and provide incentives for investment and innovation in new products and services. I trust that you will provide the leadership for it to do so.

Sincerely,

A handwritten signature in black ink, reading "Lowell C. McAdam". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Cc: FCC Chairman Tom Wheeler