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United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-6250

KEITH B. ASHDOWN, STAFF DIRECTOR
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February 9, 2015

The Honorable Tom Wheeler
Chairman
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Dear Chairman Wheeler:

The Committee on Homeland Security and Governmental Affairs is examining the Federal Communications Commission's (FCC) proposal regarding broadband Internet access. According to the *Wall Street Journal*, the White House may have inappropriately influenced the FCC decision to regulate broadband like a public utility.¹ I request your assistance in better understanding whether the White House and the FCC respected the proper boundaries established by Congress between the Executive Branch and independent agencies.

The FCC has been grappling with the issue of "net neutrality" for some time. In 2005, the FCC adopted a policy statement that consumers were entitled to: access their choice of legal Internet content, use services and run applications of their choosing, and have competition among network, application, service and content providers.² In April 2010, when the FCC tried to enforce that policy statement on a company for an alleged violation, its efforts were struck down by the D.C. Circuit in *Comcast v. FCC*.³

Lacking any evidence of a problem, the FCC spent the rest of 2010 working towards an order that would impose affirmative rules on broadband providers. In December 2010 the FCC adopted, on a party-line 3-2 vote, its "Open Internet Order."⁴ In this order, the FCC carefully weighed whether or not to reclassify broadband services as a "Title II" utility. In the end, the FCC applied a light touch regulatory framework for fixed services, recognized the technical and competitive differences of wireless, and did not touch interconnection agreements. The order specifically required broadband providers to disclose their network management practices and barred them from blocking legal traffic on their networks. The rules also prohibited fixed broadband providers from unreasonably discriminating against Internet traffic, but did not apply this prohibition to wireless broadband providers.

¹ Gautham Nagesh & Brody Mullins, *How White House Thwarted FCC Chief on Internet Rules*, WALL ST. J., Feb. 4, 2015.

² Fed. Communications Comm'n, *New Principles Preserve and Promote the Open and Interconnected Nature of Public Internet* (Aug. 5, 2005).

³ 600 F.3d 642 (D.C. Cir. 2010).

⁴ Fed. Communications Comm'n, *Report and Order, In re: Preserving the Open Internet Broadband Industry Practices* (Dec. 21, 2010).

On January 14, 2014, the D.C. Circuit upheld the FCC's transparency rule but struck down the portions of the 2010 rule that barred broadband providers from blocking content or unreasonable discrimination on their networks.⁵ The court reasoned that the FCC had chosen not to classify broadband providers as common carriers, and therefore could not impose common carrier obligations. At the same time, the court provided the FCC with a road map on how to apply very similar rules under the same authority as its 2010 order (i.e. using Section 706 of the Telecommunications Act of 1996). You appeared to accept this direction and in February 2014 announced that the FCC would pursue a new rulemaking based on this road map.⁶ Specifically, you proposed that broadband providers may charge companies different prices for different services on their networks provided that such deals were "commercially reasonable."

One year later, your views on net neutrality have apparently "evolved." On February 4, 2015, plans were revealed to regulate broadband as a Title II utility service, treat wireless the same as fixed broadband, and assert jurisdiction over Internet interconnection agreements for the first time. Not only is this a monumental shift from the 2010 FCC order, but it is a very large deviation from the previous proposal as well as the light regulatory touch applied to broadband services since the Clinton administration.

In your *Wired* op-ed you explain that this evolution occurred because you became concerned that a commercially reasonable standard might, down the road, be interpreted to mean only what is reasonable for commercial interests, not consumers.⁷ But I am concerned that undue outside pressures may have led you to this decision. In particular, my concern is the apparent pressure exerted on you and your agency by the White House.

In November 2014, the president directly weighed into the debate over net neutrality, stating, "I believe the FCC should reclassify consumer broadband service under Title II of the Telecommunications Act."⁸ Reports that week indicated that at that time you were prepared to circulate a draft proposal at odds with the president's views, but quickly pulled it back and canceled an anticipated vote on a net neutrality order in December.⁹

Building up to the president's announcement, the *Wall Street Journal* reported "unusual, secretive efforts inside the White House, led by two aides . . . built a case for the principle known as 'net neutrality' through dozens of meetings with online activists, Web startups and traditional telecommunications companies."¹⁰ This group reportedly acted as a "parallel version of the FCC itself."¹¹ Since the FCC is an *independent* agency that derives its authority from Congress and not the White House, it is highly concerning that the White House would seek to take on this

⁵ *Verizon v. Fed. Communications Comm'n*, 740 F.3d 623 (D.C. Cir. 2014).

⁶ Fed. Communications Comm'n, Statement by FCC Chairman Tom Wheeler on the FCC's Open Internet Rules (Feb. 19, 2014).

⁷ Tom Wheeler, *This is how we will ensure net neutrality*, WIRED, Feb. 4, 2015.

⁸ The White House, Net Neutrality: President Obama's Plan for a Free and Open Internet, <http://www.whitehouse.gov/net-neutrality> (last visited Feb. 6, 2015).

⁹ Brian Fung, *How Obama's net neutrality comments undid weeks of FCC work*, Wash. Post, Nov. 14, 2014.

¹⁰ Nagesh & Mullins, *supra* note 1.

¹¹ *Id.*

level of involvement in the regulatory process of the FCC, or attempt to supplant completely the agency's decision-making apparatus.

Not only was this inappropriate from a constitutional standpoint, but it also is improper from an Administrative Procedure Act perspective. The FCC must obey the notice-and-comment rulemaking procedure and all *ex parte* requirements whenever a meeting is conducted. The point of these rules is to bring transparency and accountability into the regulatory process. The White House has no such requirements and apparently told participants not to discuss the process openly.¹²

To assist the Committee in better understanding the regulatory process by which the FCC has arrived at its broadband access proposal, I ask that you please provide the following information and material:

1. Please explain what new factors or developments in the telecommunications industry have led you to conclude that the commercially reasonable standard, which you supported in 2014, is no longer appropriate.
2. Please explain why you pulled back a draft proposal on a net neutrality order in 2014 and the timing of your decision.
3. Please produce the draft proposal on net neutrality you planned to circulate in or around late November and early December 2014.
4. Have you or any other FCC employees had communications with employees or officials of the Executive Office of the President referring or relating to net neutrality, or other aspects of broadband service or service provider regulation? Please list these communications and provide the dates, the individuals involved, and the subject matters, and provide all phone logs of any oral communications, along with a list of the participants, including communications on mobile devices.
5. Was the FCC aware of the "unusual, secretive effort inside the White House" relating to net neutrality? Please explain.
6. Did any FCC employees participate in the meetings with White House officials relating to net neutrality or broadband regulation? Please provide the names of these employees, and the dates of the meetings they attended.
7. Please produce all documents and communications between or among any employee of the FCC and employees of the Executive Office of the President referring or relating to net neutrality or broadband regulation for the period November 3, 2013, to the present.

¹² See Nagesh & Mullins, *supra* note 1.

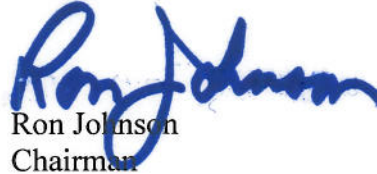
The Honorable Tom Wheeler
February 9, 2015
Page 4

Please provide this material as soon as possible, but no later than 5:00 p.m. on February 23, 2015.

The Committee on Homeland Security and Governmental Affairs is authorized by Rule XXV of the Standing Rules of the Senate to investigate “the efficiency, economy, and effectiveness of all agencies and departments of the Government.”¹³ Additionally, S. Res. 253 (113th Congress) authorizes the Committee to examine “the efficiency and economy of all branches and functions of Government with particular references to the operations and management of Federal regulatory policies and programs.”¹⁴

For purposes of this request, please refer to the definitions and instructions in the enclosure.” If you have any questions about this request, please contact Brooke Ericson of the Committee staff at (202) 224-4751. Thank you for your attention to this matter.

Sincerely,



Ron Johnson
Chairman

cc: The Honorable Thomas R. Carper
Ranking Minority Member

Enclosure

¹³ S. Rule XXV(k); *see also* S. Res. 445, 108th Cong. (2004).

¹⁴ S. Res. 253 § 12, 113th Cong. (2013).