Testimony to Energy & Telecommunications
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H 680: An act relating to protecting consumers and promoting an open Internet in Vermont

Thank you for the opportunity to testify on H. 680: *An act relating to protecting consumers and promoting an open Internet in Vermont.* I am the Executive Director of CCTV Center for Media & Democracy based in Burlington Vermont and have been working for open cable channels and open networks since 1984.

1. Background: What is Net Neutrality and Why Is It Important to Preserve?

Net Neutrality is the basic principle that prohibits internet service providers like AT&T, Comcast and Verizon from speeding up, slowing down or blocking any content, applications or websites you want to use. Net Neutrality is the way that the internet has always worked--as an open network of networks designed for the free flow of information, and the exchange and creation of knowledge.

In 2015, millions of activists pressured the Federal Communications Commission to adopt historic Net Neutrality rules that keep the internet free and open — allowing people to share and access information of their choosing without interference.

After a decade-long battle over the future of the internet, in 2015 the FCC adopted strong Net Neutrality rules based on Title II of the Communications Act, giving internet users the strongest protections possible.

Courts rejected two earlier FCC attempts to craft Net Neutrality rules and told the agency that if it wanted to adopt such protections it needed to use the proper legal foundation: Title II. In February 2015, the FCC did just that when it reclassified broadband providers as common carriers under Title II.

Title II gave the FCC the authority it needed to ensure that companies like AT&T, Comcast and Verizon can't block, throttle or otherwise interfere with web traffic. Title II preserved the internet's level playing field, allowing people to share and access information of their choosing. These rules ushered in a historic era of online innovation and investment.

The Title II rules also withstood two challenges from industry and on June 14, 2016, a federal appeals court upheld the open-internet protections in all respects.

It is worthwhile to note note that many VT citizens are relying more frequently on the internet as a source of local information. Having large ISPs be able to determine what content gets through based on an ability to pay is highly undemocratic, and further erodes the goal of a well- informed citizenry.

Without the Net Neutrality rules, companies like AT&T, Comcast and Verizon will be able to call all the shots and decide which websites, content and applications succeed. These companies can now slow down their competitors' content or block political

opinions they disagree with. They can charge extra fees to the few content companies that can afford to pay for preferential treatment — relegating everyone else to a slower tier of service.

The consequences will impact marginalized communities media outlets have misrepresented or failed to serve. People of color, the LGBTQ community, indigenous peoples, and religious minorities in the United States rely on the open internet to organize, access economic and educational opportunities, and fight back against systemic discrimination.

It is worthwhile to note note that many Vermont citizens (largely rural) are relying more frequently on the internet as a source of local information. Having large ISPs be able to determine what content gets through based on an ability to pay is highly undemocratic, and further erodes the goal of a well- informed citizenry.

2. Current Efforts to Block the FCC's "Restoring Internet Freedom Order"

Vermont is one of 27 states taking action in response to the FCC's "Restoring Internet Freedom Order", adopted on 12/14/17 and released on 1/4/18. States with pending or passed legislation include Alaska, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Iowa, Kansas, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, Washington, and Wisconsin.

Here are links to the pending bills or articles about the pending bills in nearly all of these states.

Five states—Vermont, Hawaii, Montana, New Jersey, and New York—previously decided to enforce net neutrality via executive orders issued by their governors. Vermont was the fifth state to do so. But those executive orders apply only to ISPs that provide Internet service to state government agencies, relying on the states' power as buyers of Internet service rather than on a law imposed on all ISPs.

See: https://www.digitaltrends.com/web/vermont-supports-net-neutrality/

A dozen legal challenges have been filed by 22 state attorneys general, public interest groups, internet companies, a California county and the state's Public Utilities Commission seeking to block the Trump administration's repeal of landmark rules designed to ensure a free and open internet from taking effect. The suits were filed in both the Ninth Circuit and District of Columbia appeals court.

See: https://www.reuters.com/article/us-usa-internet/u-s-appeals-court-in-san-francisco-will-hear-net-neutrality-appeal-idUSKCN1GK380)

In federal court: Last week (3/18/18), a US Appeals Court in San Francisco agreed to hear the appeal mounted by activist organizations and state/ local governments.

See: https://www.reuters.com/article/us-usa-internet/u-s-appeals-court-in-san-francisco-will-hear-net-neutrality-appeal-idUSKCN1GK380

3. The State Jursidiction Question

There is some disagreement among telecom lawyers bout the legality of state action in light of the fact that the FCC included a pre-emption of state rights in their Order. Some states are trying to evade the federal preemption with indirect measures that apply only to ISPs that accept state contracts. (Example: Vermont).

No one knows for sure how a court would rule on state bills that regulate net neutrality directly. Even legal analysts who support net neutrality laws disagree on whether such laws would survive lawsuits filed by ISPs.

For example, the Electronic Frontier Foundation's Legislative Counsel Ernesto Falcon recently argued that wtate laws that forbid all ISPs from blocking or throttling Internet traffic are "vulnerable to legal attack." There is more detail on this position here.

https://arstechnica.com/tech-policy/2018/02/californias-net-neutrality-bill-is-vulnerable-to-legal-attack-eff-says/

However, there are other legal experts who think states have jurisdiction over broadband policy and that laws would be upheld in court. Harold Feld, a longtime telecom lawyer and senior Vice President of consumer advocacy group Public Knowledge, provided the optimistic case in a 2/16/18 blog post.

See: http://www.wetmachine.com/tales-of-the-sausage-factory/can-the-states-really-pass-their-own-net-neutrality-laws-heres-why-i-think-yes/

Feld argues that state's have been regulating telecommunciations services for many years:

*"The critical question is not, as some people seem to think, whether broadband involves interstate communications or not. Of course it does. So does ye olde plain old telephone service (POTS), and states regulated that up to the eyeballs back in the day (even if they have subsequently deregulated it almost entirely). The question is whether Congress has used its power over interstate commerce to preempt the states (directly or by delegating that power to the FCC), or whether Congress has so pervasively regulated the field so as to effectively preempt the states, or whether the state law—while framed as a permissible intrastate regulation—impermissibly regulates interstate commerce (aka the "*dormant commerce clause*" doctrine).*

Feld argues that Congress has over-ruled previous FCC pre-emption attempts:

If Congress explicitly withheld authority over broadband from the FCC, it withheld from the FCC the power to preempt any "contrary" state authority. The relevant case on this is National Association of Regulatory Commissioners v. FCC ("NARUC II"). There, the FCC attempted to preempt state regulation of cable leased access channels under its general Title I authority (since Congress had not yet passed the Cable Act). The DC Circuit found that the FCC's general power over "interstate communication" did not give it the authority to preempt state regulation.

Furthermore, Feld argues that Congress recognized the vital importance of state involvement in broadband matters: *Congress has explicitly recognized the important role of the states in both protecting consumers of communications services generally (as embodied in the Communications Act in 47 USC 152(b), as well as other provisions), and explicitly recognized the important role of states in promoting broadband and broadband adoption* (see *47 U.S.C. 1302, and the Broadband Data Improvement Act of 2008). Back in Verizon v. FCC, the D.C. Circuit found that, yes, Congress was in fact delegating authority to the states over broadband along with the responsibility to encourage broadband deployment. The FCC may have decided to reverse policy, but that does not require the states — to whom Congress has explicitly delegated authority — to do the same.*

Again, I don't want to claim 100% certainty here. But I have a lot of reason to be skeptical that Congress delegated the FCC extremely narrow regulatory power over interstate communications generally, but virtually unlimited preemption power. Absent an express delegation of preemption authority (such as 47 U.S.C. 253 preempting state laws that limit entry into the telecommunications market), the FCC's preemption power is tied directly to its regulatory power. And while the FCC can interpret Section 230 as it likes with regard to its own authority, the D.C. Circuit has twice rejected the "Section 230 prohibits regulation of broadband argument" and explicitly recognized that Congress delegated authority to the states via 47 U.S.C. 1302. (It will be a fun Chevron deference case assuming the rest of the FCC's Net Neutrality Repeal survives judicial scrutiny.)

https://arstechnica.com/tech-policy/2018/03/att-and-verizon-data-cap-exemptions-would-be-banned-by-california-bill/

4. Washington State Legislation

On February 28th, the state of Washington state legislature approved a net neutrality law that applies to all wired and wireless Internet providers in the state and prohibits blocking, throttling, and paid prioritization. Washington is apparently the first state whose legislature has passed a law that imposes net neutrality rules on all ISPs

See:
http://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bills/House%20Passed%20Legislature/2282-S.PL.pdf

The bill comes in response to the Federal Communications Commission decision in December 2017 to scrap federal net neutrality rules. The state bill still needs the signature of Governor Jay Inslee, who previously pledged to enforce net neutrality "under our own authority and under our own laws," calling it "a free speech issue as well as a business development issue."

The Washington bill was approved in the state House on February 9 by a vote of 93-5. The bill passed in the Senate yesterday by a vote of 35-14.

Some states are trying to evade the federal preemption with indirect measures that apply only to ISPs that accept state contracts. No one knows for sure how a court would rule on state bills that regulate net neutrality directly. Even legal analysts who support net neutrality laws disagree on whether such laws would survive lawsuits filed by ISPs.

See: https://arstechnica.com/tech-policy/2018/02/fccs-attempt-to-kill-net-neutrality-challenged-by-new-washington-state-law/

5. California Proposed Legislation

The California legislature hs gone significantly farther in a bill introduced this week.

See:
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB822

"The [California] bill prohibits ISPs from blocking, speeding up or slowing down websites, applications, and services; charging online companies for access to an ISP's customers and blocking those that do not pay; and from entering into deals with online companies to put them in a fast lane to the ISP's customers," Barbara van Schewick of the Stanford Center for Internet and Society comments.

According to Tech Dirt (3/14/18): California state senator Scott Wiener this week introduced **SB 822**, a much tougher, more comprehensive proposal that would prohibit not only the blocking and throttling of websites and services by ISPs, but would ban "paid prioritization" deals that would allow deep-pocketed content companies (like, say, ESPN) from buying an unfair advantage against smaller competitors and startups. The bill also takes aim at the **kind of interconnection shenanigans** and double dipping that resulted in Netflix performance issues back in 2014, while leaving the door open to reasonable network management practices.

In some ways the proposal goes a bit further than the FCC's 2015 net neutrality rules, in that it more concretely addresses the problem of "zero rating" (when ISPs let a partner's content or their own bypass usage caps while still penalizing others). Zero rating in general is allowed, but only if entire classes of content are whitelisted. Individual efforts to whitelist only specific partners (as we **saw with T-Moble's controversial "Binge On" efforts**), would be forbidden, as would pay to play approaches where content

companies are allowed to buy a zero rating advantage over a competitor:

"Wiener's bill digs into more arcane matters that the Obama-era FCC's now-abolished 2015 policy included. It tackles the "zero-rating" programs, such as T-Mobile's Binge On, which exempt some sites, apps, and services from monthly data caps. Obama's FCC allowed Binge On, since T-Mobile continued welcoming new video services. California's law seems to require blanket access for all similar apps without a wait for the ISP to add them. "It can be allowed if it is about a certain class [of content], like you could have when you're doing games," says Wiener about zero-rating. "If they say we're going to apply it to a category, not any one product, and all comers, then it's not automatically illegal."

See: https://www.techdirt.com/articles/20180314/10090139425/california-introduces-new-tougher-net-neutrality-rules-uses-ajit-pais-abdication-authority-against-fcc.shtml

The bill is also more resilient to any efforts by the Trump and Ajit Pai FCC to hinder state efforts to protect consumers. Whereas many states are just regurgitating the FCC's 2015 rules in their own proposals, that alone isn't enough to protect them from potential FCC preemption, argues Barbara van Schewick, Professor of Law at Stanford Law School, and the Director of Stanford Law School's Center for Internet and Society. She also argues that the FCC shot its state preemption efforts in the foot by rolling back the classification of ISPs as common carriers under Title II of the Telecommunications Act:

"The bill is on firm legal ground. While the FCC's 2017 Order explicitly bans states from adopting their own net neutrality laws, that preemption is invalid. According to case law, an agency that does not have the power to regulate does not have the power to preempt. That means the FCC can only prevent the states from adopting net neutrality protections if the FCC has authority to adopt net neutrality protections itself.
But by re-classifying ISPs as information services under Title I of the Communications Act and re-interpreting Section 706 of the Telecommunications Act as a mission statement rather than an independent grant of authority, the FCC has deliberately removed all of its sources of authority that would allow it to adopt net neutrality protections. The FCC's Order is explicit on this point. Since the FCC's 2017 Order removed the agency's authority to adopt net neutrality protections, it doesn't have authority to prevent the states from doing so, either."

More simply, **the FCC shot itself in the foot**, and when it neutered its own authority over ISPs at Comcast, AT&T and Verizon's behest, it managed to *also* neuter its authority to pre-empt states from filling the void. Of course this could all be moot if the FCC loses its battle in court, but it's amusing all the same, and it's another example of how Ajit Pai and friends *didn't really think this whole thing through*.

From: https://www.techdirt.com/articles/20180314/10090139425/california-introduces-new-tougher-net-neutrality-rules-uses-ajit-pais-abdication-authority-against-fcc.shtml

California Version:
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB822

This bill would require that any moneys made available pursuant to the state's telecommunications universal service programs for the building of infrastructure for broadband communications be awarded only on the condition that any Internet service provider that provides broadband Internet access service utilizing that infrastructure not engage in any of the actions prohibited by the provisions of this bill. The bill would require that any moneys made available pursuant to the state's telecommunications universal service programs for access to the Internet be awarded only on the condition that any Internet service provider that receives those moneys not engage in any of those prohibited actions.

This bill would prohibit a cable operator or video service provider that has been granted a state franchise under the Digital Infrastructure and Video Competition Act of 2006, and any affiliate, that provides broadband Internet access service from taking certain actions regarding the accessing of content on the Internet by customers. The bill would require that the sworn affidavit that is required to be filed with an application for the grant or renewal of a franchise state that the applicant or its affiliates agree to refrain from taking the prohibited actions. Because the affidavit is signed under penalty of perjury, the bill would impose a state-mandated local program by expanding the definition of a crime.

This bill would require the PUC, in consultation with the Energy Commission, the ISO, and electrical corporations, to evaluate the role broadband Internet access and tools will play in the future operation of the state's smart grid.

- **More detailed definitions**

(a) "Application-agnostic" means not differentiating on the basis of source, destination, Internet content, application, service, or device, or class of Internet content, application, service, or device.

(b) "Application-specific differential pricing" means charging different prices for Internet traffic to customers on the basis of Internet content, application, service, or device, or class of Internet content, application, service, or device, but does not include zero-rating.

(c) "Broadband Internet access service" means a mass-market retail service by wire or radio provided to customers in California that provides the capability to transmit data to, and receive data from, all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. "Broadband Internet access

service" also encompasses any service provided to customers in California that provides a functional equivalent of that service or that is used to evade the protections set forth in this chapter.

(d) "Class of Internet content, application, service, or device" means Internet content, or a group of Internet applications, services, or devices, sharing a common characteristic, including, but not limited to, sharing the same source or destination, belonging to the same type of content, application, service, or device, using the same application- or transport-layer protocol, or having similar technical characteristics, including, but not limited to, the size, sequencing, or timing of packets, or sensitivity to delay.

(m) "Third-party paid prioritization" means the management of an Internet service provider's network to directly or indirectly favor some traffic over other traffic, including through the use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (1) in exchange for consideration, monetary or otherwise, from a third party, or (2) to benefit an affiliated entity.

(n) "Zero-rating" means exempting some Internet traffic from a customer's data limitation.

- **More specific prohibitions**

(b) Speeding up, slowing down, altering, restricting, interfering with, or otherwise directly or indirectly favoring, disadvantaging, or discriminating between lawful Internet traffic on the basis of source, destination, Internet content, application, or service, or use of a nonharmful device, or of class of Internet content, application, service, or nonharmful device, subject to reasonable network management practices.

(c) Requiring consideration from edge providers, monetary or otherwise, in exchange for access to the Internet service provider's end users, including, but not limited to, requiring consideration for either of the following:

(1) Transmitting Internet traffic to and from the Internet service provider's end users.

….

(e) Engaging in application-specific differential pricing or zero-rating in exchange for consideration, monetary or otherwise, by third parties.

(f) Zero-rating some Internet content, applications, services, or devices in a category of Internet content, applications, services, or devices, but not the entire category.

(g) Engaging in application-specific differential pricing.

(h) Unreasonably interfering with, or unreasonably disadvantaging, either an end user's ability to select, access, and use broadband Internet access service or lawful Internet content, applications, services, or devices of the end user's choice, or an edge provider's ability to make lawful content, applications, services, or devices available to an end user, subject to reasonable network management practices.

(i) Engaging in practices with respect to, related to, or in connection with, ISP traffic exchange that have the purpose or effect of circumventing or undermining the effectiveness of this section.

(k) Advertising, offering for sale, or selling broadband Internet access service without prominently disclosing with specificity all aspects of the service advertised, offered for sale, or sold.