



Communications Policy & The Congress

**Remarks by Walter B. McCormick, Jr.
USTelecom President and CEO
Media Institute – April 22, 2015**

Thank you for inviting me to be here today. It is an honor to address the Media Institute – an organization known for its commitment to freedom of speech, to the First Amendment, to competition in the marketplace of ideas, and to competition in the communications industry.

USTelecom and its member companies share these values and objectives. We pride ourselves in providing broadband Internet service in a manner that promotes freedom of speech, fosters a competitive communications industry, and provides a platform for excellence in journalism.

It is these values that the President of the United States, and the Chairman of the FCC, have said they want to protect by imposing new “Open Internet” regulations on Internet service providers to restrict their blocking access to lawful websites, throttling traffic, or offering paid prioritization.

We agree with the Open Internet standards. Our industry operates in conformance with them. We have supported their adoption as regulations under the Commission’s Section 706 authority, and we support their enactment into law by the United States Congress.

So why has USTelecom filed a lawsuit challenging the FCC’s Open Internet Order? Why have other organizations that also support the standards filed suit?

It is not the wisdom of the standards that we are challenging. We are challenging the FCC's *reclassification* of Internet access to be a "telecommunications" common carrier service – and the imposition of 19th century railroad regulation on the 21st century Internet. It is bad policy – bad for consumers, bad for innovation, bad for investment, bad for American competitiveness in the world economy. It is a regulatory model that Congress never intended to be applied to the Internet. Indeed, just the opposite. Congress made it abundantly clear in Section 230 of the Telecommunications Act that a "*service ... that provides access to the internet*" should not be subject to Title II – knowing that this form of economic regulation was regulation for a bygone era, had contributed to the financial collapse of the railroads, and was detrimental to investment. Indeed, by 1996 Congress had already repealed it for the traditional common carriers – rail carriers, motor carriers and air carriers – under the leadership of a Democratic Administration, House, and Senate.

So, our position is not partisan, or political. It is rooted in economics, the law, and the lessons of history.

The only reason the Commission is reclassifying Internet access is because it wants to promulgate Open Internet regulations, but it can't find clear statutory authority to do so. Congress did not give the Commission broad authority to regulate information services, or interactive computer services, or the Internet. But, Congress did give the FCC authority to regulate telecommunications. So, after having tried repeatedly to regulate with regard to the Internet, and having it overturned by the courts, the FCC has decided to simply call *one* "thing", a *different* "thing", over which it has very broad power. In doing so, the Commission violates the express terms of the 1996 Act, and the Administrative Procedure Act's standards for "reasoned decision making," which require a showing of "changed circumstances." There has been no change in the technology of broadband Internet access. The only change in circumstances has been that the Commission has decided it would like to expand its authority.

The scope of the Commission's assertion of jurisdiction is breathtaking. It redefines the Internet, inserts the government deep into its management, and by its action invites other countries to do the same. Although the Commission says that it will forbear from rate regulation, it asserts jurisdiction to determine the reasonableness of rates, terms and conditions of service offerings under Section 201 and 202 of the Act. It says that it will respond to complaints, and therefore will now offer service providers the option of applying for an advisory opinion before instituting a new service or pricing plan – thus effectively establishing a pre-approval process for innovations that could benefit consumers. And, for the first time, the FCC has asserted jurisdiction over Internet interconnection, effectively extending the agency's oversight to business arrangements that blanket the entire network-of-networks that make up the Internet, and that have thrived under peer-to-peer negotiations and commercial agreements.

We have, therefore, petitioned the judicial branch of government. We are asking it to make clear that the FCC has *exceeded* its statutory authority.

But, we are simultaneously petitioning the legislative branch of government, and we are asking it to *expand* the FCC's authority to enable it to adopt the Open Internet standards advanced by the President.

The question of the agency's jurisdiction can be resolved by either branch. However, we would prefer that it be resolved by the legislative branch, as it is the source of the agency's authority, and is the only branch that can grant new powers. Therefore, having this resolved by the legislative branch offers the best prospect for settling the issue once and for all.

So, what are the chances of getting Congress to act? It's been a long time since it exercised its legislative muscle in this area – 25 years since the last reauthorization of the agency, nearly 20 years since the passage of the 1996 Act.

Well, we are optimistic.

There is a political axiom: You have to have consensus on the problem before you can have consensus on the solution.

Here there is broad consensus on the problem: The existing statute does not provide the FCC with clear authority in this area. Everyone agrees on that, even the Chairman of the FCC.

There is broad consensus on the objective: The President's articulated broadly agreed-upon standards.

And, we are seeing real bipartisan engagement in the Senate, on the part of Senate Commerce Committee Chairman John Thune and Ranking Democrat Bill Nelson, and in the House, between Commerce Committee Chairman Fred Upton and Ranking Democrat Frank Pallone.

At the end of March, at the dedication of the Edward M. Kennedy Institute for the U.S. Senate, President Obama reflected on Senator Kennedy's ability to forge compromises, and in reflecting on his legislative partnership with Republican Senator Orrin Hatch, said "The point is, we can fight on almost everything. But we can come together on some things."

When it comes to the Open Internet, Congress is being presented with the opportunity to come together and adopt standards that enjoy broad, bipartisan agreement – and in doing so provide certainty.

And perhaps, just perhaps, if Congress can come together on an issue where there is such broad agreement and successfully pass a bill, then maybe it will begin to look for other areas with regard to the Internet and communications policy where – frankly – there is a lot of agreement on the problems.

The Communications Act is 81 years old. The last FCC authorization was 25 years ago. The last significant update to the Act was nearly 20 years ago. The vast majority of those now serving in Congress have not had a hand in determining how much of their authority should be delegated to the FCC. Indeed, 86 of the 100 sitting Senators, and 368 of the 435 Members of the House, have been elected since the passage of the 1996 Act.

The long absence of major Congressional action on communications legislation, with the exception of new authority for the Commission to conduct spectrum auctions, is a relatively recent phenomenon. Consider the years of the Reagan, Bush and Clinton Administrations: Congress enacted the Cable Act in 1984. Congress passed bills reauthorizing the FCC in 1986, 1988, and 1990. In 1992, Congress passed another cable law, and even overrode a Presidential veto of that legislation. Congress almost enacted a major reform of the Communications Act in 1994, and succeeded in doing so in 1996. In other words, every two years, in each Congress,

direction was provided to the FCC. Thus, nineteen years is a long time for an agency exercising delegated authority to operate without an update to its mandate, or to the scope of its jurisdiction.

But when you consider how much technology has changed over this period, the disparity between the assumptions underlying the law and the reality of today's communications marketplace is astounding. In 1996, consumers subscribed to local telephone service from one provider, and long-distance from another. Local telephone companies did not offer video services, and cable operators did not offer voice telephone. Cellular telephones were large, and typically consumers had a choice between only two providers. And no one offered broadband. Companies such as Google, Facebook, Netflix, and Skype did not exist. There was no such thing as smartphone applications, or devices like the iPhone, iPad, or iWatch.

So, there is a need for Congress to re-engage on communications policy. We hope that Congress *will* reengage.

First, by quickly enacting bipartisan legislation to protect the Open Internet.

Then, by enacting legislation to reauthorize the agency, as a routine matter, consistent with its responsibility to periodically review agency authority and provide guidance. I know that House Communications Subcommittee Chairman Greg Walden is interested in resurrecting the biannual agency reauthorization process, and in speaking with Ranking Member Anna Eshoo, I know that she, too, would like to see Congress legislating in a more routine way.

Finally, Congress needs to update the nation's communications laws.

There is remarkable consensus on the problems that need to be addressed. Just last year, the House Energy & Commerce staff issued a series of white papers noting that the "siloed" nature of the law fails to address technological convergence and the intermodal competition that exists today. We all know that IP-based services present classification and jurisdictional challenges,

that there is no clarity with regard to the Internet, and that the FCC and FTC are tripping over each other in asserting jurisdiction over certain functionally equivalent services.

And, in addition to broad consensus on the problems, I believe there is an opportunity to forge a consensus on what some of the *objectives* of an update should be. Let me suggest a few – a list that, by no means, is meant to be exhaustive.

First, there is broad agreement that government should continue to play an important role in safeguarding the rights and reasonable expectations of consumers. Therefore, a focus on consumers should be at the heart of regulatory policy. There should be protections for privacy, for data security, for network security, and for access to fire, police and emergency response. There should be protections for Americans with disabilities. And, these consumer protections should be assured without regard to the platform, the service or the application, and enforced by a single expert agency.

Second, the Internet needs to be treated as an ecosystem. Public policy should not balkanize regulatory jurisdiction over services that are technologically integrated, interdependent, or functionally substitutable.

Third, there should be an update to universal service – a new commitment for the broadband needs of the 21st century – and the interests of low income Americans, those living in rural areas, and the elderly and the disabled.

Fourth, there should be a continuing focus on protecting and promoting competition, while encouraging innovation, investment, and American competitiveness. Competition policy should be based on the 21st century communications marketplace, pursuant to standards set by Congress, and administered by a single agency with economic and technological expertise. It should be designed to analyze market dynamics, emerging trends, and how competition is evolving, rather than making assumptions about the state of competition based upon historical dominance, legacy offerings, or past market position. This authority should include merger reviews, which should

be examined pursuant to a common set of antitrust standards, and focused on preserving vibrant consumer choice.

Finally, I hope that those now serving in Congress will feel free to think outside the box. It seems the debate today is, in many cases, over how to divide authorities between existing agencies, such as the FTC and the FCC, or whether they should be given joint jurisdiction. I would suggest this is myopic. The FTC was established 100 years ago, the FCC 81 years ago, by Congresses of the past that creatively approached the challenges of their time. As such, today's Congress can decide whether new structures might work better. Indeed, in the last 30 years, the Interstate Commerce Commission – the model for the FCC – has been restructured and renamed, becoming the Surface Transportation Board; the Civil Aeronautics Board has been sunset, its consumer protection functions transferred to the Department of Transportation; and the Department of Homeland Security has been created. While regulators may feel the need to zealously protect, promote and even seek to expand the role of their legacy agencies, Congress can think more broadly about what is in the best interests of the American people and the challenges of today.

In closing, let me suggest that all of us affiliated with the Media Institute also have a larger interest in seeing Congress re-engage in legislating in this field – an interest that goes beyond the immediacy of today's communications policy. It goes to the importance of checks-and-balances, separation of powers, the constitutional system of government that this distinguished organization has worked so hard, over so many years, to protect and promote. Under that system, a regulatory agency doesn't get to enlarge the scope of its own jurisdiction, or to decide that it may be in the public interest for it to expand its own powers. Those decisions belong to the duly elected representatives of the people.

That is the crux of the issue presented in our lawsuit. We support an Open Internet. We agree with the principles. But, the FCC is exercising authority it has not been delegated by the Congress, and the end does not justify the means.

Thank you.