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Via ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

Re: In the Matter of Safeguarding and Securing the Open Internet, WC Docket No. 23-320

Dear Ms. Dortch:

The Founding Fathers saw all of this coming, not least because they had seen it all happen at one time or another before. Not specifically but broadly. What did they foresee? They had first-hand experience at observing governments that would, rather than protecting the rights and liberties of its citizens, ultimately turn against the people in various ways to take away rather than give or protect. To fight against what seemed and seems like the natural regression of government authority, the drafters of our Constitution and Bill of Rights did their best to provide us with a democracy we could keep.

But the march of executive authority without legislative action, and so without the voice of the people, is playing out once again at the FCC. This time by revisiting the never-ending search for a rationale to impose the so called "net neutrality" heavy handed regulations, or as they are referred under the law, Title II restrictions and limitations. This decades long debate, and vacillation of policy, of whether the internet should continue operating under the very successful light touch regulatory regime or whether it needs the restricting grip of Washington DC has continued to interject periods of economic uncertainty, and hence risk to consumers, into the broadband marketplace.

The Continuous Attempts for Government to Throttle the Internet Need to End
As noted previously by the Commission in a previous Notice of Proposed Rulemaking, "Long before the commercialization of the Internet, federal law drew a line between the heavily regulated common carrier

services and more lightly regulated services that went beyond mere transmission. And for almost twenty years, the Internet flourished under a light touch regulatory approach."[1]

Political leaders on the Hill via the 1996 Telecommunications Act which codified that bright line established so long ago, the courts, Presidents and FCC Chairmen including one Democrat and then two successive Republican FCC chairmen, outlined and ultimately published a "policy statement" that brought definition to the light touch approach with four principles that should be preserved by the broadband industry. These were guidelines that worked to normalize the principles without an onerous regulatory apparatus and accompanying government introduced politics and ulterior motives. For well over a decade these bi-partisan principles were followed, "to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation."[2]

The FCC's hands-off strategy during the Clinton and Trump administrations were seasons of a dedication to an unfettered internet. The Bush administration was known for its light-touch approach. But the Obama administration turned away completely from a vibrant market, and allowing users to control their online experience and instead sought a direction dictated by the federal government. That Administration desired the restrictions and control of Title II regulations and the Biden administration apparently desired to merely pick up where they left off. The FCC seems more than willing to do what the administration desires.

The goal of more broadband, more places, more often, and for more people was being met in those hands off and light touch eras. The grounding in the free market was the very reason for success. No other model conceived even comes close to seeing the same level of consumer freedom flourish alongside consumer choice. From 1996 until 2015, and then again in the late 20-teens, the internet was routinely bringing new, exciting innovations forward that not only appealed to "netizens" and the established online ecosystem but also continued to attract those who were not yet taking part. Investments, from capital expenditures to research and development to hiring to creation and innovation, were all taking place at an astonishing rate, largely because of stable predictable policy.

But for some this was not their vision for the one-sixth of the U.S. economy that is the internet ecosystem. Instead, they seemed to remain on a quest to force a different, less effective, more consumer restrictive, intellectual experiment. And so, back in 2015 the FCC decided to capitulate to political pressure, abandoning its role as an independent, expert agency for communications issues, and along a strict party line determination brought ISPs under the heavy-handed government control rules of Title II that went far beyond the four principles of net neutrality. While the decision was the subject of many legal challenges and so never actually put in place after a couple years the country had had enough.

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[1] In the Matter of Restoring Internet Freedom, WC Docket No. 17-108
https://docs.fcc.gov/public/attachments/FCC-20-151A1.pdf

[2] U.S. policy was eventually codified specifically at 47 U.S.C. § 230(b)(2). Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 151 et seq.) (1996 Act). However throughout the 1990's Congress and the President set out U.S policy where the internet was concerned. Also generally the Telecommunications Act of 1996.

By 2017 the Commission changed course again and once again moved to allow the internet to flourish, rolling back the Obama strictures. The last five years have provided a virtual clinic to demonstrate the resilience of the internet and internet service providers.

Free of restrictive rules that would have required a slow process of seeking permission before any changes or improvements, broadband providers were able to navigate the challenges of the COVID pandemic with world class success. While European providers, to cite just one example, had to throttle and slow internet access for those desperate for more and more communications, in the U.S. consumers were able to successfully work, attend school, be provided healthcare and play from home throughout the government lock down and beyond. Simply put, Americans did better because of the national policy in regards to the internet and the provision of internet service.

However, flying in the face of the remarkable evidence, and clinging to fear and unsupported imagined future harms, the FCC is poised to again throttle the internet, but this time with even less reason and now with shaky justification paired with very cynical timing.

After Decades of Trying to Justify Title II Controls a Sudden and Rushed New Justification
After decades of this debate, a brand-new justification for tighter control has suddenly emerged. Now, public safety and national security have become the excuse for deeming the internet a "common carrier," the rationalization to gain broader and deeper regulations. If the concern is as urgent as this Notice of Proposed Rulemaking claims then why the delay of years or months or even weeks? Has the FCC merely ignored these deep concerns for so long?

The timing is particularly suspect since these serious concerns seemed non-existent while the Commission's political split was 2-2. But as soon as a new commissioner was approved this novel justification was put forth. Urgency ensued. One could easily believe that if the concern was so great, if in fact the FCC was the great hope as a line of defense for our national security, that all commissioners, regardless of political leanings would likely support action. Instead, political goals have driven the sudden panic and rush to consider old ideas presented as new necessities.

Another curiosity is that other agencies across government do not seem to be rushing to act in any concentrated way. The specific national security rationale seems to be solely a FCC concern. For example, are agencies suddenly reviewing all their equipment for any Chinese technology at any layer in the stack? Even assuming that such an urgency exists that can only be addressed by the FCC, the question that remains as to how common carriage, the imposition of Title II, can address the issues. This remains unanswered, and more importantly unanswered by Congress. This seems to follow the disturbing pattern by those who favor government control of our internet experience – the assertion of speculative worries that never come to fruition demonstrating that their assumptions and speculation are wrong time after time.

In fact, the entirety of the process seems rushed resulting in oversights. Or perhaps there are no oversights, only intention. Rumors that the notice existed for months just awaiting a new commissioner were prominent and could lead one to assume that every word included or those excluded was done with intention. For example, would this rulemaking result in stand-alone domain name services (DNS)

being classified as information services under Title I of the Communications Act? Perhaps this change is intentional or perhaps an omission.

Regardless, this rulemaking does not cite the Commission's 2015 order where the Commission found, "that DNS is a telecommunications service (or part of one) when provided on a stand-alone basis by entities other than the provider of Internet access service. In such instances, there would be no telecommunications service to which DNS is adjunct, and the storage functions associated with stand-alone DNS would likely render it an information service." This omission leads one to wonder if the FCC has indeed reversed its existing policy that stand-alone DNS resolution service is not covered under Title II. Of course, such details are not just merely important but are indeed critical to some of the foundational parts of the internet ecosystem.

This Radical Move is a Major Question of Public Policy Necessarily Needing Direct Congressional Action
If in fact this radical change in direction is warranted then certainly Congress should be involved in laying out the justification and providing a framework for addressing such a major question of public policy. In two ways the very justification, as a required predicate, provided by the Commission for again undertaking an about face on national policy demonstrates just how major a question the Commission is tackling without any Congressional direction. Additionally, assertions made in this Notice seems to discredit placing government so squarely in charge of what is an incredibly successful collection of industries.

Without a doubt the internet ecosystem has become increasingly important for all citizens. This Notice clearly states the importance in several places but also in framing the issues beginning right in the introduction, "While Internet access has long been important to daily life, the COVID-19 pandemic and the rapid shift of work, education, and health care online demonstrated how essential broadband Internet connections are for consumers' participation in our society and economy. Congress responded by investing tens of billions of dollars into building out broadband Internet networks and making access more affordable and equitable, culminating in the generational investment of $65 billion in the Infrastructure Investment and Jobs Act."

If anything, the description undersells how much internet use is woven into so much that we do in work, entertainment, education, research, health, transportation, interaction with our government and more. As mentioned, our internet ecosystem is more than one-sixth of the U.S. economy so changes from a broad market-based approach to a strict regulatory regime of Title II will result in great changes to so much that we do. Certainly, such sweeping regulatory change impacting such a broad swath of our economy is worthy of specific Congressional action and direction. In this case Congress has not acted. By doing so they continue to send a very clear message – that the declarations they made years ago and have updated since with other actions are still the intended direction of policy governing the internet. To change that path is a major question of national public policy which only Congress is qualified to address.

The Commission continues its introduction in this Notice saying, "But even as our society has reconfigured itself to do so much online, our institutions have fallen behind." If true, then the idea of placing these very "fallen behind" institutions in charge of our digital tomorrow seems fraught with disaster.

Also, this Notice argues, "…reclassification will strengthen the Commission's ability to secure communications networks and critical infrastructure against national security threats." And that, "…the reclassification will enable the Commission to protect public safety during natural disasters and other emergencies…We believe that the actions we propose today are critical to protecting the nation's security and the public's safety…"

The new rationale for Title II for the internet is national security and public safety. National security relates to the physical well-being of the nation much as the previous rationalization related to the nation's economic security. Taken together they may be the most important services a government can provide, almost a minimum requirement to be considered a coherent nation. To imagine that Title II authority somehow is a critical foundation to meet these goals stretches belief. But if that is so then Congress certainly would have acted to make this change in internet regulation explicit and if not then given the breadth of the change certainly Congress must act, not rely on an ever-changing interpretation of unelected agency leaders.

Importantly, Congress did leave room for improvement by providing the narrow ability to address tweaks in providing the Commission with the ability to forebear. Simply put, the Commission was provided the authority that when it determined that when certain statutory requirements were met that it could forebear, and in fact must forebear, from enforcing rules that once might have been necessary to ensure reasonable practices, or to protect consumers, but no longer serve that purpose. That Congress did not provide some broad sweeping authority to change national policy on internet regulations is telling in that it could have as easily included broader authority rather than choosing the narrow forbearance ability.

Given the Commission's case for the importance of the internet as explained in this Notice, a change from Title I to Title II would have a profound impact on almost every aspect of life in America and certainly to the innovation ecosystem. If so, then one could hardly imagine a better example of a major question only appropriate for direct Congressional comment and action.

One Step Closer to the End of Free Expression and Freedom of Association
Currently the Supreme Court is considering a case that will further illuminate the breadth of our First Amendment protections from government. In Murthy v. Missouri, the state of Missouri filed suit against the Biden Administration claiming that the U.S. government pressured social media companies to censor conservative views and criticism of the Administration in violation of the right to freedom of expression.

As the Commission is overtly seeking to dramatically expand authority beyond internet infrastructure all the way to edge providers, such as social media software companies, the recent actions of the Administration as relevant as they are worrying. Addressing digital equity, the Notice moves well beyond making sure all Americans have access to broadband. "We believe BIAS [broadband service] connections promote diversity of viewpoints by allowing traditionally disadvantaged communities to express themselves outside of traditional media. Social media websites and other platforms particularly have become important platforms for free expression, political engagement, and social activism. Indeed, Congress has recognized that 'the Internet offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.' Accordingly,

we invite comment on any equity-related considerations associated with classifying BIAS as a telecommunications service and any benefits or drawbacks of such classification for relevant communications."

In an era where government is overtly pressuring companies already, expanding authority to another agency with the power to potentially pull spectrum licenses from internet service providers seems ill-advised for the sake of free expression and the American people. Given the current case under review at the Supreme Court a world where broadband providers, edge service providers or even cloud computing companies are threatened because of allowing or disallowing certain legal activities, companies, people, communities, beliefs or interests is no longer a far-fetched concern but rather a clear threat to public safety.

Fundamentally, the right answer for nation of laws cannot be that every time there is someone new in the White House that the national policy guiding the internet completely reverses, a back and forth over whether government will with heavy hand control our internet experience or whether the market place and consumer choice will stay the rule.

All too often and for far too long political forces return to ideas that are not in favor but the moment some political faction can assemble a successful vote they pursue bad ideas that had already been rejected. Sadly, the FCC seems to have once again been captured by such forces rather than pursuing a course destined for innovation regardless of the political winds. Instead of continuing down what appears to have been a path laid out regardless of rationale or reason, hopefully the Commission will reconsider its current trajectory for the sake of the rule of law, innovation, the internet and most importantly the American people.

Respectfully submitted for your consideration,

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