



Statement by

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INTRODUCTION

Chairman Marino, Ranking Member Cicilline, and members of the subcommittee, thank you for this opportunity to testify about the perspective of small rural broadband network operators on agency roles and governance in regard to net neutrality issues. I am Michael Romano, Senior Vice President for Industry Affairs and Business Development of NTCA–The Rural Broadband Association, which represents nearly 850 small rural, community-based member companies that deploy and operate advanced networks in 46 states.

NTCA members and companies like them serve the most rural parts of the United States, reaching areas that contain less than five percent of the U.S. population but which are spread across more than 35 percent of the U.S. landmass. The distances to cover and the low population densities present unique challenges, and underscore the critical importance of these small telecom providers that connect rural Americans with the world. Even in the face of such challenges, however, these small, hometown businesses make every effort to deploy advanced networks that respond to consumer and business demands for cutting-edge services that position rural communities for success in a rapidly-changing world.

NTCA members' broadband networks are critical to ensuring their rural users can participate effectively in an increasingly online world with access to economic development, educational, health care and other vital tools. Fixed and mobile broadband, video, and voice are among the services that many rural Americans can access thanks to our members' networks and commitment to serving sparsely populated areas. These technologies serve as a business incubator in rural areas that would almost certainly otherwise see entrepreneurial activity gravitate toward urban markets.

With this background, smaller providers like those in NTCA's membership likely have a unique perspective on the questions to be tackled at this hearing. Any small business can undoubtedly tell you that heavy-handed regulatory burdens can be distracting at best or devastating at worst. NTCA members are truly small businesses, with staffs that range from two to just a few hundred employees. But, in the rural broadband context particularly, rules that require extensive legal and technical disclosures and network monitoring can impose substantial costs. These companies serve areas where the average density is seven customers per square mile; to put this in context, this is roughly the average density for the entire state of Montana. Expenditures of both staff time and financial resources for compliance with burdensome rules can distract from or undermine efforts to carry out the core mission of universal service in rural America – deploying advanced networks to ensure that every American has access to services that are reasonably comparable to those in urban areas at rates that are reasonably comparable to those paid by urban consumers.¹ This goal is not aspirational; universal service is a mandate charged by Congress in the Telecommunications Act of 1996.

¹ 47 U.S.C. § 254(b)(3).

At the same time, given the capital-intensive nature of rural telecom – where distance and density make it such that returns on investment can measure in decades – regulatory certainty is essential. Indeed, the notion of regulatory uncertainty in key aspects of operations and the prospect of “regulatory pendulum-swinging” between agencies and frameworks can be as concerning as overreaching rules. Finding a clear and stable balance in any framework to follow is therefore essential to promote and sustain rural broadband investments.

BROADBAND POLICY AND THE PROPER “DIVISION OF LABOR” BETWEEN FEDERAL AGENCIES

NTCA believes that the retail broadband marketplace is hindered, rather than helped, by burdensome communications-style regulations that favor certain segments or otherwise frustrate the market’s ability to develop and deploy innovative offerings for consumers. For these reasons, even as NTCA has supported limited and targeted oversight with respect to *transmission elements* of underlying networks, it has consistently advocated for a *materially different* Title II-based application and regulatory regime than what the Federal Communications Commission (“FCC”) ultimately chose to adopt and implement in 2015.

Specifically, for reasons that will be further explained below related to the rural nature of the areas our members serve, NTCA has consistently urged a surgical focus upon underlying networks and how they connect with one another in lieu of substantial *ex ante* regulation of retail services. Although we had hoped that the 2015 *Open Internet Order*² might adopt a much more limited approach along the lines of that advocated by NTCA, it did not. Instead, the order created new unique and complex duties out of long-standing statutory provisions that differed even from prior regulations based upon those same statutes, and then imposed those obligations exclusively upon those offering retail broadband. As noted in my introduction and discussed further below, such burdens can be particularly distracting and difficult for smaller providers with limited staff resources operating in challenging rural markets.

Indeed, leading up to the 2015 Open Internet order, NTCA could not have more clearly opposed – and we continue to oppose today – a heavy-handed framework that singles out *retail broadband providers* alone for ill-fitting, retrofitted legacy regulations and one-sided duties. As we expressly stated in 2014, “Title II need not, and indeed should not, apply to all of the services offered atop these regulated networks – including, but not limited to, retail broadband Internet access as provided to the end-user.”³ We further argued at the time:

² *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (“*Open Internet Order*”).

³ Comments of NTCA, GN Docket No. 14-28 (filed July 28, 2014), at 10-11.

[A] singular focus on “last mile” or “retail” [Internet Service Providers] fails to recognize the breadth of the relationships that exist amongst and between: (1) those entities; (2) other entities in the Service and Network Ecosystem; and (3) consumers. Broadband Internet access service providers and Content/Edge Providers exist in a multi-sided market. . . . Moreover, other network providers exist in this Service and Network Ecosystem and are just as critical to its functioning and resultant achievement of significant public policy goals. Middle mile providers, transit providers, backbone providers, and content delivery networks (“CDNs”) all hold themselves out to retail ISPs and Content/Edge Providers alike as being capable of conveying data from one point to another for purposes of data.⁴

Ironically, despite ultimately adopting rules that singled out retail broadband providers, the FCC itself appeared to recognize the multi-faceted nature of this marketplace in 2014 as well:

No one company defines your personal Internet experience. The Internet Service Providers (ISPs) that sell you Internet access are only one part of a complex ecosystem that also includes backbone providers, content delivery networks, and other Internet traffic actors. The connection points between and among these groups have many names: peering, transit, proxy services, interconnection, or traffic exchange.⁵

In addition to raising concerns in 2014 about retail broadband regulation generally and a singular focus on retail broadband providers more specifically, it was unclear what actual consumer benefits could be realized by some of the rules being adopted. For example, as NTCA noted in comments to the FCC in 2015 while trying to obtain a continuing exemption from burdensome “enhanced” network monitoring and disclosure requirements, mandating that smaller providers gather and report consumer data on measures like “packet loss” – an inherent design of broadband networks and a feature imperceptible (if not indecipherable) to most consumers – represented a misplaced focus that resembled more network micromanagement than customer service.⁶ NTCA therefore joined a group

⁴ *Id.* at 3-4.

⁵ *Internet Traffic Exchange: Time to Look under the Hood*, Julie Knapp and Walter Johnston, Official FCC Blog (Jun. 18, 2014), available at: <https://www.fcc.gov/news-events/blog/2014/06/18/internet-traffic-exchange-time-look-under-hood>.

⁶ Comments of NTCA, GN Docket No. 14-28 (filed Aug. 5, 2015), at 4-5 and 12.

of other like-minded small business provider representatives – the American Cable Association, the Competitive Carriers Association, and the Wireless Internet Service Providers Association – in urging the FCC to extend that exemption as it neared expiration.⁷ NTCA and its members were greatly encouraged when FCC Chairman Ajit Pai indicated that he would propose waiving these requirements after they had been allowed to take effect with respect to smaller operators in late 2016 once the prior exemption lapsed, and we were grateful when the FCC voted soon thereafter to waive such compliance through 2022.⁸

When it comes to oversight specifically of retail broadband offerings, NTCA has therefore expressed consistent concern regarding the prospect of heavy-handed, one-sided regulation and its particular impact on smaller and rural operators. Accordingly, NTCA asserts that fundamental consumer protection and retail marketplace competition issues are more appropriately overseen by the Federal Trade Commission (“FTC”), which is far better-versed in such issues and expert in the oversight of mass-market services generally and can “see across industries,” than by the FCC. This would continue to provide consumers with robust and reasonable protections. In the first instance, at least in the case of NTCA members, it important to recall who these operators are – small providers based largely in the rural communities they serve. As members of the communities, they have every reason and incentive to prioritize customer service and to protect customer information; their customers are their families and their neighbors. Moreover, from a broader legal and public policy perspective, the FTC has broad experience, of course, in consumer protection matters in its role of policing against unfair or deceptive acts or practices across a wide swath of offerings and industries.

This is why, for example, NTCA joined with a number of other industry organizations and providers in January 2017 to “reaffirm and restate [our] longstanding, pro-consumer privacy practices based on the highly respected FTC framework that has protected internet users for years and provided the flexibility necessary to innovate new product solutions to enhance consumers’ online experiences.”⁹ To be clear, the FCC can and should certainly be an expert resource for and partner to the FTC to the extent that unique questions regarding communications policy might affect the retail broadband marketplace, but to subject one segment of a broader “ecosystem” to differing rules to govern the same data that others also hold only highlights the value and wisdom of having the FTC serve as the primary agency in overseeing all retail marketplace matters of this sort.

⁷ *Ex Parte* Letter from NTCA, *et al.*, GN Docket No. 14-28 (filed Dec. 13, 2016) (highlighting the need for a continued exemption in the face of burdens associated with aspects of the enhanced transparency rules).

⁸ *Small Business Exemption from Open Internet Enhanced Transparency Requirements*, GN Docket No. 14-28, Order, 32 FCC Rcd 1772 (2017).

⁹ *See Protecting Consumer Privacy Online – Internet Companies Reaffirm Consumer Privacy Principles* (rel. Jan. 27, 2017).

Indeed, in this case, the usefulness of relying on the FTC in this regard would recognize that many actors beyond retail broadband providers play a role upon the dynamic broadband stage from the consumer perspective. These issues were at the forefront of debate in the FCC's "broadband privacy" proceeding, where firms with access to the same types of consumer data would have been subjected to different standards.¹⁰ Specifically, retail broadband providers, had the FCC rules remained operative, would have been subject to specialized, detailed requirements while other kinds of providers which typically hold as great, if not greater, volumes of data would have remained subject to a uniform structure established pursuant to Section 5 of the Federal Trade Commission Act.

At best, this sector-specific privacy regulation adopted as a follow-on to the 2015 *Open Internet Order* would have roughly duplicated FTC guidelines that address unfair or deceptive trade practices; at worst, disparate treatment as ultimately adopted by the FCC would have imposed an unwarranted thumb upon the market's scales and confused consumers by setting disparate expectations of privacy and security with respect to the very same data. Moreover, even though our members have significant experience with Title II regulation in other contexts as historical "telephone companies," the new "net neutrality" privacy rules both rewrote in material respects existing telecom practices and procedures and substantially expanded the scope of data covered – changes that would have presented sizeable burdens and potentially undermined efforts by our small business members to focus on deploying and operating broadband networks in rural America. (To try to mitigate such concerns, NTCA had urged the FCC to focus any possible new privacy regulations, at most, only upon data uniquely available to a retail broadband provider by virtue of the sale of broadband to consumers and to subject such data to pre-existing privacy procedures used in the telecom industry,¹¹ but such suggestions for a more limited approach were ignored.)

But, even as it should be clear that the FTC is best positioned to oversee and address any concerns arising out of the retail offering of broadband services, other fundamental public policy principles and distinct statutory provisions must not be overlooked as our nation considers next steps in broadband-related public policy. As we are on the cusp of a potential transition in "broadband oversight policy," this presents an important and useful opportunity to establish and affirm a more appropriate and clear-cut "division of labor" between federal agencies based upon clear statutory constructs, core competencies, and agency expertise.

¹⁰ *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106, Report and Order, 31 FCC Rcd 13911 (2016).

¹¹ Comments of NTCA, WC Docket No. 16-106 (filed May 27, 2016), at 19-20.

In particular, antitrust policy looks primarily at abuse of market power and competition. Thus, while the FTC is best positioned to play the essential role as described above in connection with consumer protection and competition matters in a dynamic retail broadband marketplace, antitrust alone will not be able to address every important communications-related policy question; there are certain other charges that Congress has directed to the FCC instead as a separate and distinct matter of law. Of particular significance to rural America, one of these key broadband-related public policy goals is universal service – the notion enshrined in the Communications Act that every American should have access to robust and affordable services that enable connectivity with all other users. The ongoing importance of promoting universal service in a broadband world has consistently been a bipartisan and non-controversial objective, and this policy must therefore be cared for in any regulatory transition to come.

It is to help achieve this broader universal service public policy objective and serve this distinct statutory mandate that NTCA has suggested as a separate matter ensuring a clearly defined, light-touch regulatory framework targeted specifically at the underlying networks that enable communications, as contrasted to the *retail* broadband services that have been the focus of sweeping regulatory efforts and debate to date. NTCA has observed that one logical and legally sound means to implement such a light-touch framework could be to focus upon *transmission* distinctly from the provision of *retail* broadband to consumers.¹² Based upon such an analysis that looks only to the “network layer” as compared to the “service or application layer” (a concept that has historical legal and practical precedent), NTCA has thus urged that all networks could be subject to separate limited and targeted oversight with respect to the exchange of data between points.

To be clear, however, any oversight with respect to the network layer must itself be carefully tailored and not interfere with a dynamic and diverse broadband marketplace; certainly, such network-focused measures must not transform into new “net neutrality” rules, creep into *retail* broadband regulation, or impose significant *ex ante* obligations that deter or frustrate innovation. Moreover, the concept of a limited “backstop” with respect to interconnection and exchange of data or content between networks in the furtherance of universal service should be viewed both as a starting point *and* as a finish line to address separately in any transition to come. Rather than maintaining a vague, catch-all “Internet Conduct Rule” that appeared to give unknown and unknowable third parties rights to claim harms arising out of a retail provider’s conduct and looked to far-reaching “non-exhaustive” factors as justification for pronouncements that might impose new prohibitions on certain practices,¹³ NTCA has supported eliminating this far-ranging rule and the associated factors as adopted in 2015.¹⁴

¹² Comments of NTCA, GN Docket No. 14-28 (filed July 28, 2014), at 10-11.

¹³ *Open Internet Order*, 30 FCC Rcd at 5734-5738.

¹⁴ Comments of NTCA, GN Docket No. 17-108 (filed July 17, 2017), at 11.

In the end, achievement of the underlying consideration at issue – keeping rural America connected as a matter of universal service – is a different kind of public policy matter and is compelled by a different statute than the market power and competition questions that are the traditional provinces of antitrust law. It is a separate question to address, to be certain, but one that must not be lost in broader debates and any transitions to come. Indeed, as small businesses investing millions of dollars in capital-intensive networks in rural markets where returns are measured in decades, regulatory certainty with respect to cost recovery and connectivity with the rest of the world is essential for NTCA members to justify and then enable reasonable opportunities to recover the costs of such investments.

There are practical examples of why such separate universal service considerations are particularly pertinent for rural America and must be cared for in any transitions to come. First, we have seen suggestions in the past by some network operators to limit the number of “interconnection points” for the exchange of data between networks spread out across wider geographic areas. Such interconnection arrangements may work well if one has a nationwide network footprint. However, our national universal service policy – the statutory mandate that all Americans must have access to reasonably comparable services at reasonably comparable rates – is at risk if small, rural-based network operators (and ultimately their rural consumers) are compelled to bear the costs of carrying massive and increasing amounts of data to and from distant centralized interconnection points that may be hundreds of miles from a given rural service area.

Another example of public policy connectivity concerns can be seen in the rural call completion context, where the high costs of connecting rural areas and a perceived regulatory vacuum led to calls failing to reach rural American consumers and businesses. It was only when the FCC could step in that proper incentives to complete calls were restored and matters improved. This “canary in the coal mine” experience indicates that some oversight is necessary to ensure that rural America can stay connected with the rest of the world consistent with the goals of universal service. (And, for those who might think such a risk remote in a broadband world, who would have thought a decade ago that entities might decide to stop delivering telephone calls to rural America?)

To help rural America get and stay connected with the rest of the world in furtherance of universal service, NTCA has therefore recommended a targeted framework that would prohibit actions in the interconnection and exchange of data between networks that undermine broadband deployment and universal service, and enable the FCC to step in and resolve disputes that may arise between such operators consistent with such a prohibition. We believe such a “backstop” is necessitated by the statutory goal of universal service and would encourage broadband investment – particularly in rural America where, as discussed above, it is harder to justify broadband deployment to begin with and where smaller providers and their customers unfortunately know too well what it means to be “cut off” from the rest of the world.

It will undoubtedly be noticed that the immediately preceding discussion refers to the FCC when it comes specifically to matters of interconnection and the implications of such practices on universal service public policy. This is a purposefully suggested – and purposefully targeted – “division of labor.” As noted above, the FTC’s core competencies come in the areas of consumer protection and antitrust matters, making it the optimal entity to assess such concerns with respect to the retail broadband marketplace. But when it comes to practical questions of how networks interconnect and exchange data, there is no federal agency better versed or more expert in these particular matters than the FCC. Moreover, the FCC is expressly charged by statute with preserving and advancing the nation’s universal service mandate. For these reasons, as an important complement (but as a distinctly separate matter) to the FTC’s lead in addressing consumer protection and competition matters in the retail broadband marketplace, NTCA believes the FCC has a very different but equally important role to play going forward in serving specific goals defined by the Communications Act, such as making sufficient and predictable universal service support available for broadband services that consumers may choose and also ensuring seamless connectivity between rural America and the rest of the world.

Thus, as regulatory and possibly statutory transitions are contemplated in furtherance of an open Internet, NTCA urges this subcommittee and Congress – and the FCC and the FTC working in partnership – to ensure that other core public policy principles, such as universal service and connectivity, continue also to be promoted in a broadband world.

CONCLUSION

NTCA thanks the subcommittee for its leadership on and interest in the important issues that are contained within the overarching debate with respect to net neutrality. These issues can have real impacts on rural American consumers and businesses and the small, hometown network operators that serve them. We are hopeful that the FCC and FTC, with guidance and direction from this subcommittee and Congress more broadly, can strike a better balance in looking to antitrust principles and oversight practices that minimize regulatory burdens and regulatory uncertainty, while also sustaining a public policy environment that promotes and encourages broadband investment and connectivity, especially in rural America consistent with a congressional mandate for universal service. NTCA looks forward to continuing to work with you and the agencies in question on behalf of our hundreds of small operator members and the millions of rural Americans they serve.