

**A LEGISLATIVE HEARING ON FOUR  
COMMUNICATIONS BILLS**

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**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON COMMUNICATIONS AND  
TECHNOLOGY  
OF THE  
COMMITTEE ON ENERGY AND  
COMMERCE  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

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## CONTENTS

	Page
Hon. Greg Walden, a Representative in Congress from the State of Oregon, opening statement .....	1
Prepared statement .....	3
Hon. Anna G. Eshoo, a Representative in Congress from the State of Cali- fornia, opening statement .....	5
Hon. Marsha Blackburn, a Representative in Congress from the State of Tennessee, opening statement .....	6
Hon. Frank Pallone, Jr., a Representative in Congress from the State of New Jersey, opening statement .....	7
Hon. Fred Upton, a Representative in Congress from the State of Michigan ....	93
WITNESSES	
Robert McDowell, Partner, Wiley Rein, LLP, Senior Fellow, Hudson Institute	9
Prepared statement .....	11
Harold Feld, Senior Vice President, Public Knowledge .....	31
Prepared statement .....	33
Elizabeth Bowles, President & Chair of the Board, Aristotle, Inc. (on Behalf of Wireless Internet Service Providers Association) .....	49
Prepared statement .....	51
Answers to submitted questions .....	119
SUBMITTED MATERIAL	
H.R. 2669 .....	82
H.R. 1301 .....	86
H.R. 2666 .....	89
Small Business Broadband Deployment Act .....	91
Statement of the Amateur Radio Relay League, Inc. ....	94
Statement of the Community Associations Institute .....	101
Statement of the Federal Communications Commission .....	113
Statement of CTIA—The Wireless Association .....	116



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TUESDAY, JANUARY 12, 2016

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY,  
COMMITTEE ON ENERGY AND COMMERCE,  
*Washington, DC.*

The subcommittee met, pursuant to call, at 10:15 a.m., in room 2123 Rayburn House Office Building, Hon. Greg Walden (chairman of the subcommittee) presiding.

Members present: Representatives Walden, Latta, Shimkus, Blackburn, Lance, Guthrie, Kinzinger, Bilirakis, Johnson, Collins, Cramer, Eshoo, Doyle, Welch, Clarke, Loeb sack, DeGette, Butterfield, Matsui, McNerney, and Pallone (ex officio).

Staff present: Ray Baum, Senior Policy Advisor for Communications and Technology; Leighton Brown, Deputy Press Secretary; Rebecca Card, Assistant Press Secretary; Andy Duberstein, Deputy Press Secretary; Gene Fullano, Detailee, Telecom; Kelsey Guyselman, Counsel, Telecom; David Redl, Counsel, Telecom; Charlotte Savercool, Professional Staff, Communications and Technology; Gregory Watson, Legislative Clerk, Communications and Technology; Christine Brennan, Minority Press Secretary; Jeff Carroll, Minority Staff Director; David Goldman, Minority Chief Counsel, Communications and Technology; Jerry Leverich, Minority Counsel; Lori Maarbjerg, Minority FCC Detailee; and Ryan Skukowski, Minority Policy Analyst.

### OPENING STATEMENT OF HON. GREG WALDEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Mr. WALDEN. I will call to order the subcommittee on Communications and Technology and welcome everyone here for our first hearing of 2016.

I thank our distinguished panelists for being here to share your views on these bills with us today and I want to welcome my colleagues back as we get underway in what should be another very busy and hopefully productive year for the subcommittee on Communications and Technology.

I would like to thank you all for the great work we have done not only last year but over the last few years that have produced bipartisan legislation that has become law. And, actually, as you look to—I think today's the deadline for broadcasters to decide if they are going to participate in the auction. Another big auction could be underway, the first of its kind, that could produce more revenue for the taxpayers and more wireless broadband for people.

So pretty exciting times in which we live and we will be continuing to do oversight on the auction and the issues associated with it. We will continue to do oversight on FirstNet and those issues as we go forward and other issues that members have brought to our attention.

So look forward to another big and productive year for our subcommittee and I thank the great participation that we get.

Now onto today's hearing. We will hear from a panel of distinguished witnesses on four bills, each designed to improve the legal and regulatory environment for consumers and small businesses.

First, the subcommittee will consider H.R. 2669. This is the Anti-Spoofing Act of 2015 introduced by Representatives Meng, Barton, and Lance. It is a reintroduction of legislation that came out of this subcommittee last Congress. H.R. 2669 would extend the provisions of the Truth in Caller ID Act to text messaging and VoIP services. This legislation passed the House unanimously last Congress. I expect it will enjoy a similar level of support in this Congress.

Second, we will examine H.R. 1301. This is the Amateur Radio Parity Act of 2015. As a HAM radio operator and perhaps one of the only in Congress, I am acutely aware of the passion that amateur radio operators have for their service. Despite its widespread use and importance in times of emergency, some land-use restrictions in some areas have prioritized aesthetics over the rights of HAMs. H.R. 1301 seeks to ensure that amateur radio operators get a fair shake and protection from unnecessary bans on their equipment by instructing the FCC to adopt rules to this end. Now, I know some have said that this is opening the door to 40-foot towers in town home backyards. That is not the case. HAM equipment can be as small as over-the-air digital television antennae that are becoming popular with cord-cutters. Surely HAM radio operators' communications deserve no less protection than access to prime time television. This is a common sense bill and I urge my colleagues to support it.

Finally, we will consider two bills that concur with FCC's own policy. H.R. 2666, Representative Kinzinger's No Rate Regulation of Broadband Internet Access Act, seeks to codify the assurances of FCC Chairman Tom Wheeler by prohibiting the FCC from using its new authority under the Open Internet Order to regulate rates charged for broadband. Simply put, this is what President Obama and Chairman Wheeler have stated publicly time and again, but put in statutory form. President Obama, in his now infamous YouTube directive to the FCC, directed the FCC to reclassify broadband under Title II "while forbearing from rate regulation." In front of multiple congressional committees in both the House and the Senate, Chairman Wheeler has continually repeated what he stated succinctly in his statement when the FCC adopted the Open Internet Order, that "that means no rate regulation, no filing of tariffs and no network unbundling."

H.R. 2666 simply does what President Obama and Chairman Wheeler cannot—it binds future chairmen to live by the commitments that this administration has made as to how the sweeping authority the FCC granted itself is to be used. Some have been critical of this bill, seeking to change the language to preclude the use of tariff authority, an authority the FCC has already forborne

from using, while leaving the Commission and its enforcement bureau free to use enforcement authority to regulate rates. Rate regulation by after-the-fact second guessing is rate regulation nonetheless. We should ensure that the specter of rate regulation of broadband is off the table permanently.

In addition to Mr. Kinzinger's rate regulation bill, we will also examine a discussion draft of a bill that I am offering to make permanent the exception to the Commission's enhanced transparency rule for small businesses. In the Open Internet Order, the Commission rightly recognized that the work required by the enhanced transparency rule would be an undue burden on small businesses and it provided a temporary exception from the rule. Just last month, the FCC extended that exception through the end of 2016.

While I am sure that small businesses are appreciative of the reprieve from the costs of compliance with this rule, the reprieve is not a pardon. Small businesses deserve the certainty of a permanent exception from this unnecessary burden. Additionally, this draft would also harmonize the FCC's definition of a small ISP with the definition used by the U.S. Small Business Administration. It makes no sense to subject businesses to different definitions of small across different agencies and deference to the SBA definition ensures that the part of the federal government charged with small business issues reigns.

These four bills will ensure that consumers and small businesses are protected from unnecessary burdens and misuse of the authorities granted in law and I look forward to advancing these bills to the House floor as soon as possible. I thank our witnesses for being here to discuss the diverse sets of bills and I look forward to their counsel.

I ask unanimous consent now to enter into the record a letter from Mr. Chris Imlay, general counsel of the Amateur Radio Relay League, expressing support for the Amateur Radio Parity Act, as well as a letter from Mr. Thomas Skiba, CEO of the Community Association's Institute suggesting changes to the legislation from the perspective of homeowners and community associations. Without objection.

[The information appears at the conclusion of the hearing.]

Mr. WALDEN. I also want to thank both the ARRL and CAI for their comments on this legislation and we look forward to working with them and with the ranking member as we advance this important legislation.

I would also like to ask unanimous consent to enter into the record a letter from FCC Commissioners Pai and O'Rielly expressing concern with the impact of the enhanced transparency rule on small businesses and questioning the veracity of the FCC's Paperwork Reduction Act analysis. Without objection.

[The information appears at the conclusion of the hearing.]

[The prepared statement of Mr. Walden follows:]

#### PREPARED STATEMENT OF HON. GREG WALDEN

Today the subcommittee will hear from a panel of distinguished witnesses on four bills, each designed to improve the legal and regulatory environment for consumers and small businesses. First, the subcommittee will consider H.R. 2669, the Anti-Spoofing Act of 2015. This legislation, introduced by Reps. Meng, Barton, and Lance,

is a reintroduction of legislation that came out of this subcommittee last Congress. H.R. 2669 would extend the provisions of the Truth in Caller ID Act to text messaging and VoIP services. This legislation passed the House unanimously last Congress and I expect it will enjoy similar support this Congress.

Second, we will examine H.R. 1301, the Amateur Radio Parity Act of 2015. As a HAM radio operator, I am acutely aware of the passion that amateur radio operators have for their service. Despite its widespread use and importance in times of emergency, land-use restrictions in some areas have prioritized aesthetics over the rights of HAMs. H.R. 1301 seeks to ensure that HAMs get a fair shake and protection from unnecessary bans on their equipment by instructing the FCC to adopt rules to this end. Now, I know some have said that this is opening the door to 40-foot towers in townhome backyards. Hogwash. HAM equipment can be as small as the over-the-air digital television antennae that are becoming popular with cord-cutters. Surely HAM radio operators' communications deserve no less protection than access to primetime television. This is a common sense bill and I urge my colleagues to support it.

Finally, we will consider two bills that put me in a position I have not been in all that often in the last year: agreement with the FCC.

H.R. 2666, Representative Kinzinger's No Rate Regulation of Broadband Internet Access Act seeks to codify the assurances of FCC Chairman Tom Wheeler by prohibiting the FCC from using its new authority under the Open Internet order to regulate the rates charged for broadband. Simply put, this is what President Obama and Chairman Wheeler have stated, time and again, in statutory form. President Obama, in his now infamous YouTube directive to the FCC, directed the FCC to reclassify broadband under title II "while forbearing from rate regulation[.]" In front of multiple Congressional committees, in both the House and the Senate, Chairman Wheeler has continually repeated what he stated succinctly in his statement when the FCC adopted the Open Internet order: "That means no rate regulation, no filing of tariffs, and no network unbundling."

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In addition to Mr. Kinzinger's rate regulation bill, we will also examine a discussion draft of a bill that I am offering to make permanent the exception to the commission's "enhanced transparency rule" for small businesses. In the Open Internet order, the commission rightly recognized that the work required by the enhanced transparency rule would be an undue burden on small businesses and provided a temporary exception from the rule. Just last month, the FCC extended that exception through the end of 2016.

While I am sure that small businesses are appreciative of the reprieve from the costs of compliance with this rule, the reprieve is not a pardon. Small businesses deserve the certainty of a permanent exception from this unnecessary burden. Additionally, this draft would also harmonize the FCC's definition of small ISP with the definition used by the U.S. Small Business Administration. It makes no sense to subject businesses to different definitions of "small" across different agencies and deference to the SBA definition ensures that the part of the federal government changed with small business issues reigns.

These four bills will ensure that consumers and small businesses are protected from unnecessary burdens and misuse of the authorities granted in law and I look forward to advancing this bills to the House floor as soon as possible. I thank the witnesses for being here to discuss this diverse set of bills and look forward to their counsel.

Mr. WALDEN. I yield back the balance of my time. I thank the committee's indulgence and I recognize the gentlelady from California, Ms. Eshoo, for opening comments.

**OPENING STATEMENT OF HON. ANNA G. ESHOO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA**

Ms. ESHOO. Thank you, Mr. Chairman, and happy New Year to everyone and thank you to the witnesses.

It is wonderful to see you, and I want to associate myself with what the chairman said about looking forward to this year.

We have a lot on our plate. There are exciting things that are taking place and I think that the full engagement of this subcommittee not only in oversight but legislative ideas that come up that we will make optimum use of this year.

It is always said that in the presidential election year nothing happens but I don't think that that tagline is going to apply to our subcommittee.

So I too look forward to working with you and with all of the members on both sides of the aisle to uphold the work that the committee does.

So today is our first subcommittee meeting of the year and we have some important bills in front of us. I think it is a mixture of good and perhaps not so good bills. But I think that with the key witnesses that we have here today I will raise my questions with them.

First up is H.R. 2666, the No Rate Regulation of Broadband Internet Access Act. I agree, Mr. Chairman, about no rate regulation. So you can put my name down next to the president, to the FCC chairman and Anna Eshoo.

I am not for the FCC regulating the monthly recurring rate that consumers pay for broadband Internet access service. Now, consistent with this view, last year, as we all know, Chairman Wheeler adopted what some of us call a modern light touch approach that foregoes the unnecessary provisions of Title II such as rate regulation, tariffing and cost accounting rules.

At the same time, the commission has an important role to play—and this is what I want to highlight on this issue—in consumer protection, which includes the billing practices of the nation's broadband providers.

You will recall that I raised the issue over and over again of below-the-line fees and I think that in our discussions with the witnesses it is something that we really should kind of pull apart and examine to make sure that there aren't any unintended consequences of the legislation for consumers.

I think it is an area that we can come to an agreement on because it includes discriminatory data caps or some future practice that we don't even foresee right now. So I think it is an area that we need to take a good look at.

Secondly, the subcommittee is considering the Small Business Broadband Deployment Act. Now, this is proposed so that small businesses will not be burdened—small broadband providers—and I think that that is very important.

The bill exempts companies with hundreds of millions in annual revenue from complying with the enhanced transparency requirements included in the FCC's 2015 Open Internet Order.

Now, this includes disclosure of promotional rates, fees, charges and data caps. But it would leave millions of consumers, particu-

larly those in rural areas, with fewer protections than those in big cities.

I think that we can reach some common ground on this and I want to work with everyone on this. But I don't think that rural areas that are particularly hard hit—when you see the report that came out of the FCC, rural areas are really lagging behind in our country with broadband.

Third, while I have been a long-time supporter of amateur radio operators including you, Mr. Chairman, and the services that they provide—and I have a lot in my district—I do have some concerns with the Amateur Radio Parity Act.

As written, the legislation could violate the rights of homeowners associations and that is who I have heard from. So I think, again, we have got to take a look at this and make sure that we can blend the underlying purpose of this and not stick it to the homeowners associations—the HOAs in the country—by overruling covenants and easements that are conveyed with the purchase of a property from one seller to another.

And I am proud to be a co-sponsor of Congresswoman Grace Meng's legislation, the Anti-Spoofing Act. It is a bipartisan bill. It is a good bill.

I think there are, what, nearly 20 members of the subcommittee that are co-sponsors of it and it deserves to move forward the way it did before.

So, again, thank you, Mr. Chairman, for convening this hearing. Look forward to this year and I yield back.

Mr. WALDEN. I thank the gentlelady for—

Ms. ESHOO. Yield back though. Thank you for your patience.

Mr. WALDEN [continuing]. Comments and we look forward to working together on these and other issues this year.

We turn now to the vice chair of the full committee, the gentlelady from Tennessee, Ms. Blackburn. Good morning. Welcome.

**OPENING STATEMENT OF HON. MARSHA BLACKBURN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE**

Mrs. BLACKBURN. Thank you, Mr. Chairman, and I want to say welcome to our witnesses. We are pleased that you are here and I am appreciative of the four bills that we are going to discuss this morning.

I want to touch on two of these. First, the Small Business Broadband Deployment Act, protecting the small ISPs who really don't have the resources to comply with net neutrality's enhanced disclosure requirements.

This is important for us. The small ISPs and serving their footprint are many times the way we can increase that access to affordable broadband. So we are going to be anxious to talk about that and to get your insights on that.

Secondly, H.R. 2666, which codifies Chairman Wheeler's pledge that he made and President Obama's pledge likewise, to not engage in rate regulation.

This is something that is important to us to do. I thought it was so interesting last March in Barcelona at the Mobile World Congress.

Chairman Wheeler said, "This is not regulating the Internet. Regulating the Internet is rate regulation, which we don't do."

We want to make certain that he is good to that promise. Rate regulation is something that causes us tremendous concern.

I appreciate Congressman Kinzinger bringing the legislation forward and look forward to a full discussion of that proposal with you all.

And at this time, I yield the balance of the time to Mr. Latta.

Mr. LATTI. Well, I appreciate the gentlelady for yielding and also thank the chairman for holding today's hearing and I would also like to thank our witnesses for being with us today. Greatly appreciate it.

All four bills before us today are good legislative measures that will eliminate unnecessary government regulations and protect consumers.

I would like to focus my time on the two bills that stem from the FCC's decision to reclassify broadband as a telecommunication service under Title II of the Communications Act.

First, they resolved Title II; the FCC extended its authority to regulate rates charged for broadband. The threat of rate regulation would chill network investments and stifle innovation.

H.R. 2666, of which I am a co-sponsor, would prohibit the commission from regulating rates and remove regulatory uncertainty for Internet service providers.

Secondly, the Small Business Broadband Deployment Act would help eliminate a burdensome regulation created by Title II by making permanent the temporary exemption for small ISPs from enhanced transparency requirements.

Providers in my district have made it clear to me that this exemption is vital for their continued operation. I look forward to today's hearing and I appreciate the gentlelady yielding.

I yield back.

Mrs. BLACKBURN. Yield back.

Mr. WALDEN. The gentlelady yields back, and now we will turn to the ranking member of the full committee, the gentleman from New Jersey, Mr. Pallone.

**OPENING STATEMENT OF HON. FRANK PALLONE, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY**

Mr. PALLONE. Thank you, Mr. Chairman, and our ranking member, Ms. Eshoo, for holding this hearing, and let me also thank our witnesses for being here.

I know you are not strangers to the subcommittee and I appreciate your willingness to come up to testify.

I also appreciate the commitment that Chairman Walden is showing to regular order. Legislative hearings like this one we are holding today do not simply check a box.

They help our members and the public better understand the potential effects of the bills before us. When the committee is given

opportunities to make reasonable and thoughtful decisions, we end up with better results.

I am particularly interested in learning more today about the bill prohibiting the FCC from regulating rates for broadband Internet access. I agree with the sentiment driving this bill.

The commission should not be setting rates for broadband access. In fact, we have heard from FCC Chairman Wheeler himself that he does not intend to set rates.

Nonetheless, I have also heard concerns that as drafted this bill may result in significant unintended consequences. For instance, some believe that it could spur endless litigation, leading to uncertainty in the market and deterring investment.

Worse, the bill could seriously curtail the FCC's ability to protect consumers. Obviously, that result is not acceptable. Today's hearing gives us the chance to learn more about these potential consequences and whether the bill can be better targeted to avoid these pitfalls.

I would also look forward to hearing more about the other three bills on today's agenda. Amateur radio, transparency into service provider practices and prevention of fraudulent caller ID are all important topics worthy of a fair hearing.

But while today's hearing marks a good start for the year, I hope that this is only the first legislative hearing we hold.

I further hope that future hearings include ideas put forward by Democratic members such as Congressman Welch's Digital Learning Equity Act, Congresswoman Matsui's Spectrum Challenge Prize Act, Congressman Lujan's FCC Transparency Act and even my own Viewer Protection Act, or SANDy Act.

All of these bills address pressing issues the American people care about and they deserve the opportunity to be heard.

So with that, I look forward to the rest of the discussion and I yield the balance of my time to the gentlewoman from California, Ms. Matsui.

Ms. MATSUI. I thank the ranking member for yielding me time.

Two of the bills on our agenda address the FCC's net neutrality order. Like millions of Americans who made their voices heard last year, I support a free and open Internet.

At the same time, I do not believe the FCC needs to get into the business of regulating consumer broadband rates. Chairman Wheeler has also stated many times that he is not interested in rate regulation either.

What I am concerned about is the potential for paid prioritization schemes to create fast and slow lanes on the Internet and that is why I introduced a bill with Senator Leahy to instruct the FCC to write rules to ban paid prioritization, and I was pleased that the FCC included a ban on paid prioritization in the net neutrality rules.

I am concerned that the two net neutrality bills we are considering today could undermine important consumer protections like the paid prioritization rule.

I do look forward to hearing from today's witnesses about all four bills under consideration today. I thank the witnesses for being here today and I yield back to the ranking member to give time to anybody else, if he so feels. Thank you.

Mr. WALDEN. All time has been consumed and yielded back and we appreciate the comments of all of our members.

We will now go to our witnesses and thank them for being here: the Honorable Robert McDowell, Partner, Wiley Rein, LLP, and Senior Fellow at the Hudson Institute—we thank you for being here; Mr. Harold Feld, Senior Vice President, Public Knowledge—good to have you back before our committee as well; and Ms. Elizabeth Bowles, President and Chair of the board of Aristotle, Inc. on behalf of the Wireless Internet Service Providers Association. Ms. Bowles, we appreciate your being here to testify, too.

So I think we will start with Mr. McDowell. We have always enjoyed having you before the committee and we are glad to have you back this time.

So welcome to—as the first witness in the new year before our subcommittee. Don't blow it, OK?

**STATEMENTS OF THE HONORABLE ROBERT MCDOWELL, PARTNER, WILEY REIN LLP, SENIOR FELLOW, HUDSON INSTITUTE; HAROLD FELD, SENIOR VICE PRESIDENT, PUBLIC KNOWLEDGE; ELIZABETH BOWLES, PRESIDENT & CHAIR OF THE BOARD, ARISTOTLE, INC. (ON BEHALF OF WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION)**

**STATEMENT OF ROBERT MCDOWELL**

Mr. MCDOWELL. No pressure. Thank you, Mr. Chairman, and happy New Year to all distinguished members of the committee and Ranking Member Eshoo as well. It is an honor to be here again and to be your first witness of 2016.

And by the way, although I am a partner at Wiley Rein and a senior fellow of the Hudson Institute, the opinions I express today are strictly my own.

Congress has a terrific opportunity to pass the legislation before this subcommittee today on a bipartisan basis.

Specifically, and in the observance of time, I will refer to just two bills and then we can talk about the other two bills later—one being the No Rate Regulation of Broadband Internet Access Act and the Small Business Broadband Deployment Act.

As has been pointed out, both President Obama and FCC Chairman Wheeler have expressed their opposition to rate regulation of broadband services.

Although in 2014 the president called on the FCC to classify broadband services under Title II before it did so last year, he also asked that it forebear from rate regulation.

Similarly, Chairman Wheeler stated last May that broadband providers should be, “free from any limiting rate regulation.”

He also testified before the Senate Appropriations Committee that, “If Congress wants to come along and say that’s,” meaning rate regulation, “is off the table for the next commission, I have no difficulty with it.”

These sentiments also echo the policies of the Clinton-Gore White House and the Clinton era FCC under then Chairman Bill Kennard.

They, as well as the Federal Trade Commission on a unanimous bipartisan vote in 2007 and the Obama Department of Justice,

have all warned against regulating the rates of broadband networks.

Why? Because they and scores of independent market analysts, entrepreneurs, economists and think tanks agree that rate regulation deters investment and constructive entrepreneurial risk taking, stifles innovation and would slow the evolution of a lightning-fast Internet, and we appear to have a bipartisan consensus here today on rate regulation.

In short, H.R. 2666 merely codifies what Democrats and Republicans have been seeking, essentially, for decades: a ban on rate regulation of Internet services.

The bill could benefit, however, from clarifying at least two ambiguities. The first would be to make it clear that it prohibits all rate regulation including ex post, or after-the-fact, determinations that rates are unjust or unreasonable. As written, it applies only to ex ante, or before-the-fact, regulation.

The second would be to clarify which rates it addresses. Currently, with the Open Internet Order the FCC attempted to give itself the authority to rate regulate all Internet access services including interconnection and peering.

It is the bipartisan consensus, it appears, that these services should not be rate regulated. This bill simply offers to codify that bipartisan spirit and hold future FCCs to that promise through clear statutory language.

Similarly, the Small Business Broadband Deployment Act would codify on a permanent basis what the FCC has attempted to do on a temporary basis, which is to exempt small ISPs from the order's transparency requirements.

As the current regulatory regime now stands, the commission will review the exemption on an annual basis, leaving small business owners in a perpetual state of limbo.

There is a lot more to discuss. I do support the other two bills and look forward to a robust in-depth discussion of amateur radio.

In 7 years as an FCC commissioner, I think I spent maybe ten minutes on amateur radio. But I think five of them are renewing your license, Mr. Chairman. So—

Mr. WALDEN. I am glad you took a personal interest in it.

Mr. McDOWELL. Yes. So I look forward to discussing it. Thank you again.

[The prepared statement of Robert McDowell follows:]

STATEMENT  
OF  
THE HON. ROBERT M. MCDOWELL

PARTNER  
WILEY REIN LLP

SENIOR FELLOW  
HUDSON INSTITUTE

**“A LEGISLATIVE HEARING ON FOUR COMMUNICATIONS BILLS”**

BEFORE THE  
UNITED STATES HOUSE OF REPRESENTATIVES  
COMMITTEE ON ENERGY AND COMMERCE  
SUBCOMMITTEE ON COMMUNICATIONS AND  
TECHNOLOGY

JANUARY 12, 2016

**OVERVIEW**

Chairman Walden, Ranking Member Eshoo, and distinguished Members of the Subcommittee, thank you for having me testify before you today. My name is Robert McDowell. From 2006 until 2013, I served as a Commissioner of the Federal Communications Commission (FCC). Currently, I am a partner of the internationally recognized law firm of Wiley Rein LLP. I am also a Senior Fellow at the Hudson Institute's Center for Economics of the Internet, a non-profit, non-partisan policy research organization. Nonetheless, I am not testifying today on behalf of any client of Wiley Rein or on behalf of the Hudson Institute. The opinions I express are strictly my own.

I am here today to discuss two proposed bills regarding the regulation of broadband Internet access service providers. The first bill, H.R. 2666, or the No Rate Regulation of Broadband Internet Access Act, would prevent the FCC from regulating the rates charged for broadband Internet access intended by the FCC in its 2015 Open Internet Order.<sup>1</sup> This bill would be a positive and constructive development for the Internet because the FCC's Open Internet Order, while expressly proscribing *ex ante* rate regulation, leaves open the possibility that the Commission could regulate rates in different ways, resulting in collateral and negative effects on broadband infrastructure investment.

The second bill, called the Small Business Broadband Deployment Act, would make permanent the FCC's temporary exemption for small businesses from the enhanced disclosure rules imposed by the Commission's Order. While the FCC's practice has been to grant annual exemptions from these rules for small providers, this bill would provide statutory certainty to

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<sup>1</sup> *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) ("*Open Internet Order*"). The FCC's decision to classify broadband internet access service as a telecommunications service subject to Title II of the Communications Act is currently being reviewed by the U.S. Court of Appeals for the D.C. Circuit. I have long maintained that Title II regulation of broadband providers is both unnecessary and unlawful. If the court vacates the FCC's classification decision, the FCC would once again be legally barred from regulating broadband prices under Title II.

these providers that they will not be subject to these burdensome requirements in the future.

Congress has a terrific opportunity to pass these bills on a bipartisan basis and further the cause of Internet freedom.

EXTENDED ANALYSIS**H.R. 2666 IS NECESSARY BECAUSE THE FCC'S OPEN INTERNET ORDER LEAVES OPEN THE POSSIBILITY THAT THE COMMISSION COULD ENGAGE IN RATE REGULATION, WHICH WOULD STIFLE INVESTMENT IN BROADBAND.**

H.R. 2666 addresses a very significant problem raised by Title II regulation of broadband Internet access: Title II is fundamentally about economic regulation and, specifically, price regulation. Although the FCC's Order expressly prohibits the Commission from engaging in *ex ante* rate regulation—in the form of tariffing requirements or otherwise—the Order does nothing to proscribe *ex post* rate regulation. Instead, because the Commission has reclassified broadband as a Title II service, its provision is subject to Section 201(b) of Title II, which *requires* that all charges and prices be “just and reasonable.”<sup>2</sup> Under this provision, in the FCC's view, it has the authority—either in response to a complaint or on its own initiative—to review and pass judgment on the retail prices charged by broadband providers.

The FCC attempted to reserve this authority in the Order. While it differentiates between *ex ante* and *ex post* rate regulation, the Order asserts only that the FCC will forbear from applying Title II “in a manner that would enable the adoption of *ex ante* rate regulation.”<sup>3</sup> By singling out *ex ante* rate regulation for forbearance, the Order makes clear that *ex post* rate regulation has not been prohibited. Moreover, the Order acknowledges that the FCC will have authority to dictate the rate-related terms and conditions of broadband plans that are offered to consumers. The Order explains that the Commission will be reviewing practices such as usage-based pricing and zero-rating of broadband uses, which have a direct effect on the rates that consumers pay for broadband Internet access service.<sup>4</sup> As a result, absent the passage of H.R. 2666, the Commission has

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<sup>2</sup> 47 U.S.C. § 201(b).

<sup>3</sup> *Open Internet Order* ¶ 441.

<sup>4</sup> *See id.* ¶¶ 151-53.

multiple avenues of authority to regulate the rates for broadband without employing *ex ante* rate regulation.

Rate regulation, especially through common carrier regulation, has a history of stifling investment and innovation in services. In fact, when governments have stepped back from rate regulation regimes in the common carrier context, whether those carriers were railroads, trucking companies, airlines, or communications services, investment and innovation have surged, prices to consumers have fallen, and services have improved in quality.<sup>56</sup> The Progressive Policy Institute analyzed the effect of rate regulation specifically on the investment of incumbent telcos, entrants, and cable providers in the early 1990s and early 2000s, concluding based on those examples that regulating the rates for broadband Internet access would have a deleterious effect on investment by ISPs.<sup>7</sup>

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<sup>5</sup> See Robert M. McDowell, Commissioner, Federal Communications Commission, “The Siren Call of ‘Please Regulate My Rival’: A Recipe for Regulatory Failure”, Remarks before the Italian Parliament, at 5-10 (June 28, 2012), available at [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-314884A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-314884A1.pdf) (also included as Attachment A); see also CLIFFORD WINSTON ET AL., THE ECONOMIC EFFECTS OF SURFACE FREIGHT DEREGULATION 4 (1990); Robert E. Gallamore, *Regulation and Innovation: Lessons from the American Railroad Industry* in ESSAYS IN TRANSPORTATION ECONOMICS AND POLICY: A HANDBOOK IN HONOR OF JOHN R. MEYER 493, 493 (José Gómez-Ibáñez, William B. Tye & Clifford Winston, eds., 1999); Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976); Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980); Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1985 (1980); Clifford Winston, *The Success of the Staggers Rail Act of 1980* 8-9 (AEI-Brookings Joint Center, Oct. 2005), available at <http://www.brookings.edu/research/papers/2005/10/railact-winston>; Clifford Winston, *U.S. Industry Adjustment to Economic Deregulation*, 12 J. ECON. PERSP. 89, 99 (1998).

<sup>6</sup> For instance, local service providers doubled their revenues the year after the Telecommunications Act of 1996 (“1996 Act”), Pub. L. No. 104-104, 110 Stat. 56 (1996), was passed. See INDUSTRY ANALYSIS DIVISION, COMMON CARRIER BUREAU, FEDERAL COMMUNICATIONS COMMISSION, LOCAL COMPETITION (Dec. 1998), available at [http://transition.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/IAD/lcomp98.pdf](http://transition.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcomp98.pdf). And, between 1996 and 2001, investment by telecommunications firms skyrocketed and capital stock increased at a rate that far exceeded the period before passage of the 1996 Act. See *id.* at 3-4; Lawrence J. Spiwack, *The Truth About Telecommunications Investment After the Telecommunications Act of 1996*, PHOENIX CENTER POLICY BULLETIN NO. 4, at 3-4 (2003), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=503364](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=503364). Additionally, the 1996 Act resulted in lowered prices and increased innovation. See, e.g., Reed Hundt, *Ten Years Under the 1996 Telecommunications Act*, 58 FED. COMM. L. J. 399, 402 (2006); The Telecommunications Act of 1996, NTIA (Feb. 4, 1999), [http://www.ntia.doc.gov/legacy/otiahome/top/publicationmedia/newsltr/telcom\\_act.htm#LOCAL](http://www.ntia.doc.gov/legacy/otiahome/top/publicationmedia/newsltr/telcom_act.htm#LOCAL) (citing ECONOMIC REPORT OF THE PRESIDENT, ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISORS, U.S. Gov’t Printing Office (1999), available at <http://www.gpo.gov/fdsys/pkg/ERP-1999/pdf/ERP-1999.pdf>).

<sup>7</sup> See Robert Litan and Hal Singer, *The Best Path Forward on Net Neutrality*, Progressive Policy Institute, at 5-8, 10 (Sept. 2014); see also Hal Singer and Robert Litan, *No Guarantees When It Comes to Telecom Fees*,

Furthermore, the FCC's authority to adjudicate rate cases *ex post facto* invites an unlimited number of complaints against broadband companies, heightening regulatory exposure and disrupting providers' innovative products and pricing plans.<sup>8</sup> As a recent study released by the Georgetown University Center for Business and Public Policy observed, "[N]ew regulatory hurdles to offering new services and innovations . . . introduce delay and uncertainty into the innovation cycles for Internet-related products and services."<sup>9</sup> Another study by NERA Economic Consulting explained that a price regulation regime would fail to take into account that "[t]he payoff to consumers is an Internet that provides new services, not just one that provides current services at lower cost. We would be sacrificing enormous potential social gains if we end up losing future applications by making innovation too costly."<sup>10</sup> Furthermore, when considering the risks to investment posed by direct or indirect rate regulation, industry analysts such as Craig Moffett of MoffettNathanson Research downgraded cable stocks, noting that "at its core, Title II is about price regulation."<sup>11</sup>

Additionally, both President Obama and FCC Chairman Tom Wheeler have acknowledged the risk of rate regulation by insisting that the Commission should not and will not engage in the practice. President Obama has stated that he "believe[s] the FCC should reclassify consumer

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PROGRESSIVEPOLICY.ORG (Dec. 16, 2014), <http://www.progressivepolicy.org/issues/economy/no-guarantees-when-it-comes-to-telecom-fees/>.

<sup>8</sup> See Robert Kaminski, *Mother, May I?*, Capital Alpha Partners, at 1 (July 2, 2015).

<sup>9</sup> See Kevin A. Hassett and Robert J. Shapiro, *Regulation and Investment: A Note on Policy Evaluation under Uncertainty. With an Application to FCC Title II Regulation of the Internet*, Georgetown University Center for Business & Public Policy, at 14 (July 14, 2015).

<sup>10</sup> See Christian Dippon, PhD, and Jonathan Falk, *Economic Repercussions of Applying Title II to Internet Services*, NERA Economic Consulting, at 9 (Sept. 9, 2014).

<sup>11</sup> See Craig Moffett, *U.S. Cable: Cutting the Cord . . . Downgrading Comcast, Time Warner Cable, and Charter to Neutral*, MoffettNathanson Research, at 4 (Feb. 17, 2015); see also, House Subcommittee on Communications and Technology, *Common Carrier Regulation of the Internet: Investment Impacts*, 114th Congress, 1st sess., 2015 (Testimony of Frank Louthan, Managing Director of Equity Research at Raymond James Financial), available at <http://docs.house.gov/meetings/IF/IF16/20151027/104110/HHRG-114-IF16-Wstate-LouthanF-20151027-U1.pdf> ("Title II is restricting overall investment and returns, . . . we do not believe it will make the industry as attractive to capital as it had been in the past.").

broadband service under Title II of the Telecommunications Act—while at the same time forbearing from rate regulation.”<sup>12</sup> In a similar vein, Chairman Wheeler has stated that “the Open Internet order was constructed so as to put broadband providers in a situation where they could profit from the value of their investments free from any limiting rate regulation.”<sup>13</sup> Chairman Wheeler also testified at a Senate appropriations subcommittee hearing that “our goal is not to have rate regulation. And the 201(b) interpretations that some people have said that this gives us some kind of ex-post authority, I would like to be able to make it clear that it is not a rate regulation tool.”<sup>14</sup> In response to a follow-up question regarding whether he would object to Congress prohibiting the FCC from regulating broadband rates in the future, the Chairman answered, “If Congress wants to come along and say that’s off the table for the next commission, too, I have no difficulty with it.”<sup>15</sup>

The language of H.R. 2666 is no broader than what Chairman Wheeler testified that he supports. The bill simply addresses the risk that a future Commission will use the substantial discretion left by the Open Internet Order to regulate rates post hoc through enforcement, notwithstanding the current Commission’s promises to avoid rate regulation. In fact, while I fully support the passage of H.R. 2666 as currently constituted, the bill would be improved by clarifying two ambiguities its language that could undermine this purpose.

First, the bill does not expressly state whether it prohibits *all* rate regulation, including *ex post* determinations that rates are unjust or unreasonable, or if it prohibits only the *ex ante* setting

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<sup>12</sup> President Barack Obama, *Statement by the President on Net Neutrality* (Nov. 10, 2014), available at <https://www.whitehouse.gov/the-press-office/2014/11/10/statement-president-net-neutrality>.

<sup>13</sup> Tom Wheeler, Chairman, Federal Communications Commission, Remarks at NCTA-INTX 2015, at 6 (May 6, 2015).

<sup>14</sup> Senate Appropriations Subcommittee on Financial Services and General Government, *Hearing on the FCC’s Fiscal Year 2016 Budget Request*, 114th Congress, 1st sess., 2015 (Testimony of Chairman Tom Wheeler).

<sup>15</sup> *See id.*

of rates. This creates the possibility that the next Commission could interpret the law to prohibit only *ex ante* rate regulation, which would vitiate the law's purpose and allow the Commission to engage in other forms of rate regulation.

Second, the bill is ambiguous as to which rates it addresses. To be sure, the bill is likely intended to regulate the rates charged to consumers for broadband Internet access service. But the Order also gives the FCC authority to regulate other kinds of rates, including the rates charged to edge providers<sup>16</sup> and the rates charged to other ISPs and backbone providers.<sup>17</sup>

To avoid any confusion as to what H.R. 2666 is intended to address, it should be revised to state with specificity that it refers to *all* forms of regulation of the rates for Internet access services, including peering and interconnection.

**THE SMALL BUSINESS BROADBAND DEPLOYMENT ACT WOULD GIVE SMALL BROADBAND PROVIDERS CERTAINTY THAT THEY WILL NOT BE SUBJECT TO BURDENSOME TRANSPARENCY REQUIREMENTS IN THE OPEN INTERNET ORDER.**

Congress also should enact the Small Business Broadband Deployment Act. Since the FCC adopted the Open Internet Order, it has been granting one year exemptions from its enhanced disclosure requirements for small providers of broadband Internet access service, with the current exemption in force until December 15, 2016.<sup>18</sup> These temporary exemptions have created uncertainty as to whether—and to what extent—small providers may become subject to these requirements in the future.

Congress should eliminate this uncertainty by making the exemption for small providers permanent. The requirements—which were designed with the largest broadband providers in mind—impose disproportionate compliance burdens on smaller providers, depleting the

<sup>16</sup> See, e.g., *Open Internet Order* ¶¶ 125-132 (banning paid prioritization).

<sup>17</sup> See *id.* ¶¶ 194-206.

<sup>18</sup> *Protecting and Promoting the Open Internet*, Report and Order, DA 15-1425, GN Docket No. 14-28, at 4 (rel. Dec. 15, 2015). OMB has not yet issued its approval of the enhanced disclosure rule.

resources needed for broadband Internet access service deployment and operation.<sup>19</sup> Moreover, the benefits derived from the information provided by smaller providers are minimal, and no evidence has been presented to the FCC that their subscribers are not already receiving sufficient information.<sup>20</sup> The nominal benefits derived from requiring smaller providers to comply with these regulations are eclipsed by the onerous nature of the requirements and the uncertainty created by the Commission continually reconsidering the exemption. Accordingly, Congress should enact the Small Business Broadband Deployment Act and make the exemption permanent.

#### CONCLUSION

Congress has the opportunity, on a bipartisan basis, to foreclose two possibilities that the Open Internet Order will have negative effects on the marketplace for broadband Internet access service. First, Congress should pass H.R. 2666, with some friendly amendments, which would ensure that the Commission cannot engage in the harmful practice of broadband Internet rate regulation. Second, Congress should pass the Small Business Broadband Deployment Act, which would assure small broadband Internet providers that they will never be subject to burdensome disclosure requirements.

Thank you for the opportunity to testify and I look forward to your questions.

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<sup>19</sup> See, e.g., Comments of Alaska Communications Systems, GN Docket No. 14-28, at 4-6 (filed Aug. 5, 2015); Comments of CTIA—The Wireless Association, GN Docket No. 14-28, at 1, 10-13 (filed Aug. 5, 2015); Comments of Gogo Inc., GN Docket No. 14-28, at 4 (filed Aug. 5, 2015).

<sup>20</sup> See, e.g., *id.*

**ATTACHMENT A**

REMARKS OF  
THE HONORABLE ROBERT M. MCDOWELL  
COMMISSIONER  
FEDERAL COMMUNICATIONS COMMISSION  
BEFORE THE  
ASSOCIAZIONE EGO AND PUNTOIT  
ITALIAN PARLIAMENT  
AULA DEI GRUPPI PARLAMENTARI  
ROME, ITALY  
JUNE 28, 2012

[AS PREPARED FOR DELIVERY]

*The Siren Call of “Please Regulate My Rival”:  
A Recipe for Regulatory Failure*

Thank you, Gildo, for that kind introduction. It is a great pleasure to be back in Rome, and an honor to be speaking before this impressive gathering of policy and business leaders.

Although planned months ago, both the location and timing of this conference could not have been more opportune. The Internet’s fate is, yet once again, at a crossroads. As 193 countries convene in Dubai later this year to renegotiate the International Telecommunications Regulations (ITRs), Europe’s view of new Internet regulations proposed by others will be pivotal to the outcome of this important debate. Furthermore, Italy has a crucial role to play in shaping Europe’s position on these matters as we head towards the World Conference on International Telecommunications (WCIT) treaty negotiation this coming December.

As always, but especially with the world economy in such a weakened and precarious position, governments should resist the temptation to regulate unnecessarily, get out of the way of the Internet and allow it to continue to spread prosperity and freedom across the globe. Internet connectivity, especially through mobile devices, is improving the human condition like no other innovation in world history.

Take for example the profound effect the mobile Internet has had on the lives of Ali Morrison and Isaac Assan.<sup>1</sup> Ali and Isaac operate a small pineapple farm in Central Ghana. In the past, all too often they had no choice but to sell their pineapples well below market value due to a lack of accurate pricing information. Today, however, through a new mobile application, Ali, Isaac and countless farmers just like them, can instantly find the prevailing value of pineapples in surrounding markets and price their product accordingly. What was previously impossible to accomplish is now easy and quick, not to mention incredibly empowering. Earning more money from this new Web-powered knowledge enables Ali and Isaac to own more property and increase their

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<sup>1</sup> See Ken Banks, *In African Agriculture, Information is Power*, NAT’L GEOGRAPHIC (Sept. 5, 2011), <http://newswatch.nationalgeographic.com/2011/09/05/in-african-agriculture-information-is-power/>.

standard of living – all while raising their expectations in both an economic and political sense. In short, the mobile Internet empowers the sovereignty of the individual while growing economies and fundamentally improving lives around the world.

Globally, upwards of 500,000 people become first-time Internet users *each day* precisely because the Internet has migrated further away from government control since its inception.<sup>2</sup> As governmental barriers around the Internet melted away in the mid 1990s, Internet usage skyrocketed – from only 16 million worldwide users in 1995 to over 2.3 billion today.<sup>3</sup> In short, the absence of top-down government control of the Internet sparked a powerful explosion of entrepreneurial brilliance which has not abated. That could soon change, however.

As we meet here today, some Member States of the International Telecommunication Union (ITU), as well as a few independent groups, are advocating for expanded intergovernmental powers over the Internet.<sup>4</sup> Some proposals are seemingly small or innocuous while others are conspicuously large and radical. We should be especially aware of incremental changes to the ITRs. With the potential to grow larger quite rapidly, proposed ITR amendments that appear tiny today can be the most insidious and lethal to the spread of prosperity and freedom tomorrow.

The proposals I am referring to are quite real, explicit and concrete. They are not imagined. Nor are they the product of caricatures or distortion, as a few pro-regulation proponents and some ITU leaders have alleged. The proposals speak for themselves. Or as they may have said here in Ancient Rome, “Res ipsa loquitur.” So in the absence of rhetoric and hyperbole, please allow me to briefly outline a few of them.

First, let us start with then-Russian Prime Minister Vladimir Putin’s proposal during a meeting with the Secretary General of the ITU almost exactly one year ago. Last June, he proclaimed that Member States should establish “international control over the Internet using the monitoring and supervisory capabilities of the International

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<sup>2</sup> See Internet Growth Statistics, INTERNET WORLD STATS, <http://www.internetworldstats.com/emarketing.htm> (last visited June 19, 2012). The estimated number of new users per day, as calculated by determining the change in the number of Internet users over a year divided by 365, has varied greatly over the last 5 years. Between March 2011 and March 2012, the estimated number of new online users was 506,849 per day. Over the past 5 years, however, the average daily increase in online users was approximately 630,685. *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See, e.g., *Proposals for Revision of the International Telecommunication Regulations*, ITU Member States Belonging to the Regional Commonwealth in the Field of Communications (RCC), at 6 (Apr. 17, 2012) (“Member States shall ensure that administrations/operating agencies cooperate within the framework of these Regulations to provide, by mutual agreement, a wide range of international telecommunication services of any type, including . . . services for carrying Internet traffic and data transmission.”).

Telecommunication Union.”<sup>5</sup> Again, these words speak for themselves and should be taken seriously.

True to Mr. Putin’s word, the Russian Federation subsequently put forth formal proposals that would expand the jurisdiction of the ITU into the Internet sphere simply by changing the definition of “telecommunications” to include “processing” and “data.”<sup>6</sup> At first glance, this proposed change seems small, but it is tectonic in scope. The submission by the Arab States is almost identical, by the way.<sup>7</sup>

The Russian proposal would also explicitly give the ITU jurisdiction over IP addresses, one of the most important components of the inner workings of the Net.<sup>8</sup> Control of IP addresses is control of the Internet itself.

Although the Russian Federation claims to support “unrestricted use” of the Internet, its submission calls for making a number of revealing *exceptions*, such as “in cases where international telecommunication services are used for the purpose of interfering in the internal affairs or undermining the sovereignty, national security, territorial integrity and public safety of other States, or to divulge information of a sensitive nature.”<sup>9</sup> In short, the exceptions created by the Russian Federation’s proposal would allow for unlimited intergovernmental control over the Internet’s affairs, in keeping with Mr. Putin’s vision.

<sup>5</sup> Vladimir Putin, Prime Minister of the Russian Federation, Working Day, *Prime Minister Vladimir Putin meets with Secretary General of the International Telecommunication Union Hamadoun Touré*, GOV’T OF THE RUSSIAN FED’N (June 15, 2011), <http://premier.gov.ru/eng/events/news/15601/>.

<sup>6</sup> *Proposed Revisions to Individual Articles of the ITRs*, Russian Federation, CWG-WCIT12 Contribution 95, at 2 (Apr. 13, 2012), <http://www.itu.int/md/T09-CWG.WCIT12-C-0095/en> (“*Russian Federation Contribution 95*”) (defining telecommunication as “[a]ny transmission, emission, processing or reception of signs, signals, writing, images and sounds or data of any nature by wire, radio, optical or other electromagnetic system”).

<sup>7</sup> *Proposed Revisions*, Arab States, CWG-WCIT12 Contribution 67, at 3 (Feb. 1, 2012), <http://www.itu.int/md/T09-CWG.WCIT12-C-0067/en> (defining telecommunication as “[a]ny transmission, emission, reception or processing of signs, signals, writing, images and sounds or intelligence of any nature by wire, radio, optical or other electromagnetic system”); *Proposal on Third Draft of the Future ITRs*, Arab States, CWG-WCIT12 Contribution 103, at 5 (June 4, 2012), <http://www.itu.int/md/T09-CWG.WCIT12-C-0103/en> (“*Arab States Contribution 103*”). Further, Iran argues that the current definition already includes the Internet. *Contribution from Iran*, The Islamic Republic of Iran, CWG-WCIT12 Contribution 48, Attachment 2 (Sept. 12, 2011), <http://www.itu.int/md/T09-CWG.WCIT12-C-0048/en>.

<sup>8</sup> *Further Directions for Revision of the ITRs*, Russian Federation, CWG-WCIT12 Contribution 40, at 3 (2011), <http://www.itu.int/md/T09-CWG.WCIT12-C-0040/en> (“To oblige ITU to allocate/distribute some part of IPv6 addresses (as same way/principle as for telephone numbering, simultaneously existing of many operators/numbers distributors inside unified numbers space for both fixed and mobile phone services) and determination of necessary requirements.”). See also *Arab States Contribution 103* at 9 (“Member States shall, if they so elect, be able to control all naming, numbering, addressing and identification resources used within their territories for international telecommunications/ICTs.”).

<sup>9</sup> *Russian Federation Contribution 95* at 3; *Comments on Document CWG-WCIT12/TD-64*, Russian Federation, CWG-WCIT12 Contribution 112, at 54 (June 6, 2011), <http://www.itu.int/md/T09-CWG.WCIT12-C-0112/en>.

Similarly, Egypt's submission calls for unprecedented economic regulation of Internet traffic through the ITU.<sup>10</sup>

Even though a few proposals have been offered in fora other than the ITU, each gives us a sense of where some ITU Member States would like to go with intergovernmental Internet regulation. For instance, proposals made directly to the U.N. General Assembly by China, Russia, Tajikistan and Uzbekistan call for intergovernmental regulation of Internet content and applications.<sup>11</sup> And, last year, India introduced a resolution at the U.N. calling for a new U.N. body to oversee the Internet.<sup>12</sup>

In short, whether submitted to the U.N. or the ITU, these proposals are about much more than conventional Internet governance. Their scope dwarfs the controversies regarding ICANN and domain names. Without exception, each proposal would radically restructure the Internet ecosystem for the worse. They are before us in black and white. So please look with great skepticism on vehement claims that no proposals to regulate the Internet are before the ITU or the U.N.<sup>13</sup>

<sup>10</sup> *Africa Region's Proposals to the Review of the ITRs*, Africa Region, CWG-WCIT12 Contribution 116, at 20 (2012), <http://www.itu.int/md/T09-CWG.WCIT12-C-0116/en> ("Member States shall [take measures to] ensure that fair compensation is received for carried traffic (e.g. interconnection or termination)."). See also *Proposal on International Telecommunications Connectivity (Based on Contribution CWG-WCIT12/C-84)*, Paraguay, CWG-WCIT12 Contribution 113, at 5 (June 6, 2012), <http://www.itu.int/md/T09-CWG.WCIT12-C-0113/en> (proposing that parties that enter into Internet connection agreements "take into account the possible need for compensation . . . for the value of elements such as traffic flow, number of routes, and cost of international transmission, and the possible application of network externalities, amongst others."); *Arab States Contribution 103* at 9 (proposing an amendment containing language similar to Paraguay's proposal).

<sup>11</sup> Letter dated 12 September 2011 from the Permanent Representatives of China, the Russian Federation, Tajikistan, and Uzbekistan to the United Nations addressed to the Secretary-General, Item 93 of the provisional agenda - Developments in the field of information and telecommunications in the context of international security, 66th Session of the United Nations General Assembly, Annex (Sep. 14, 2011), [http://www.cs.brown.edu/courses/csci1800/sources/2012\\_UN\\_Russia\\_and\\_China\\_Code\\_of\\_Conduct.pdf](http://www.cs.brown.edu/courses/csci1800/sources/2012_UN_Russia_and_China_Code_of_Conduct.pdf).

<sup>12</sup> Dushyant Singh, Member of Parliament, Statement on Agenda Item 16 - Information and Communication Technologies for Development, 66th Session of the United Nations General Assembly (Oct. 26, 2011), <http://www.un.int/india/2011/ind1945.pdf> (proposing "the establishment of a new institutional mechanism in the United Nations for global internet-related policies."). See also Commission on Science and Technology for Development, Summary Report of the Chair: Briefing on the Open Consultation on Enhanced Cooperation on Public Policy Issues Related to the Internet (May 18, 2012), [http://unctad.org/meetings/en/SessionalDocuments/ecn162012crp2\\_en.pdf](http://unctad.org/meetings/en/SessionalDocuments/ecn162012crp2_en.pdf) ("Some delegates called for the establishment of an intergovernmental mechanism for enhanced cooperation within the United Nations structure, which would enable governments, on an equal footing, to carry out their roles and responsibilities in international public policy issues pertaining to the Internet.").

<sup>13</sup> See, e.g., Hamadoun I. Touré, Secretary-General, International Telecommunication Union, Opening Remarks to Council Working Group – WCIT-12 (June 20, 2012), <http://www.itu.int/en/osg/speeches/Pages/2012-06-20.aspx>; Hamadoun I. Touré, Secretary-General, International Telecommunication Union, Remarks to ITU Staff on World Conference on International Telecommunications (WCIT-12) (June 6, 2012), <http://www.itu.int/en/osg/speeches/Pages/2012-06-06-2.aspx>; Hamadoun I. Touré, Secretary-General, International Telecommunication Union, Opening Welcome Speech at the World Telecommunication Policy Forum (WTPF), Meeting of the Informal Experts Group (IEG) (June 5, 2012), <http://www.itu.int/en/osg/speeches/Pages/2012-06-05.aspx>; Eric Pfanner, Debunking Rumors of an Internet Takeover, N.Y. TIMES (June 11, 2012),

In addition to the pro-regulation proposals emanating from Member States, a few non-governmental groups have put forth their own ideas for expanded Net regulation as well. This is not entirely surprising. I have learned during my six years on the U.S. Federal Communications Commission that the most common request we receive from industry is, “Please regulate my rival.” Essentially, this request translates into, “My rival is running too fast, and I want government to slow him or her down to my level.” Industry players that have long operated under legacy regulations are the most susceptible to this affliction.

Perhaps the same could be said of the recent proposal by the European Telecommunications Network Operators’ Association (ETNO).<sup>14</sup> ETNO would like IP interconnection agreements to be brought under the ITRs for the first time with a new “sending party network pays” construct.<sup>15</sup> To be effective, the ETNO proposal would have to require an international dispute resolution forum with enforcement powers as well as an intrusive new mechanism for recording Internet traffic flows on the basis of the value of traffic delivery, presumably determined by the ITU. Such expanded “monitoring capabilities” for the ITU fit perfectly into Mr. Putin’s vision of the Internet of the future.

In short, the ETNO proposal would upend the economics of the Internet by replacing market forces with international regulations that would create tremendous uncertainty, increase costs for all market players, especially consumers, and ultimately undermine the rapid proliferation of Internet connectivity throughout the globe. Disproportionately harmed by this upheaval would be the developing world. The upward trajectory of living standards for billions of people like Ali and Isaac, the pineapple farmers from Ghana, could be put in jeopardy too.

Furthermore, I can’t imagine why network operators would consciously surrender their autonomy to negotiate commercial agreements to an international regulator – unless, of course, they suffer from the “please regulate my rival” malady of an industry that has been regulated too much and for too long. History is replete with such scenarios, and the desire for more regulation for competitors *always* ends badly for the incumbent regulated industry in the form of unintended and harmful consequences.

Take, for example, the American railroads of the early 20<sup>th</sup> century. Having been heavily regulated since the 1880s,<sup>16</sup> the railroads feared competition from a new and

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<http://www.nytimes.com/2012/06/11/technology/debunking-rumors-of-an-internet-takeover.html?pagewanted=all>.

<sup>14</sup> *Revisions of the International Telecommunications Regulations – Proposals for High Level Principles to be Introduced in the ITRs*, ETNO, CWG-WCIT12 Contribution 109, at 3 (2012), <http://www.itu.int/md/T09-CWG.WCIT12-C-0109/en>.

<sup>15</sup> *Id.* at 2.

<sup>16</sup> Interstate Commerce Act of 1887, Pub. L. No. 49-104, 24 Stat. 379 (1887). I thank Clifford Winston, a senior fellow at the Brookings Institution’s Economic Studies program, for lending his expertise with transportation and industrial organization research and Dominique Lazanski, the Head of Digital Policy at

nimble competitor, the trucking industry. Anxious not to let a less-regulated upstart eat their lunch, instead of convincing the U.S. Congress to deregulate rail to be on an even footing with trucking, the railroads asked lawmakers to *regulate their rivals*. The New Deal Congress, which was enamored with regulation (thus likely prolonging the Great Depression, but that's for another speech) was more than happy to oblige in 1935.<sup>17</sup>

What was the unintended consequence of regulating rivals in the transportation context? With transportation rates cemented at artificially high levels by the regulator, manufacturers and distributors of goods that required shipping found it cheaper to deploy their own trucking fleets.<sup>18</sup> Trucks that operated privately and not as common carriers were exempt from federal economic regulation. Of course, investment and revenue flowed to the least regulated option, private trucking. Congress, the regulators and the railroads didn't foresee this entirely predictable consequence. As a result, the regulated railroads lost market share and income for decades. Rail's share of the surface freight market had fallen from 65 percent at the end of World War II to only 35 percent by the 1970s.<sup>19</sup>

Finally, by the mid 1970s, railroad and trucking executives alike saw the light and pled with Congress to *deregulate* them to give them the freedom to invest and compete in an unfettered market. After enactment of deregulatory laws in 1976 and 1980,<sup>20</sup> the rail and trucking industries respectively began to grow and prosper. Consumers were immediate beneficiaries of deregulation with rates falling by 30 percent<sup>21</sup> and transit time reduced by at least 20 percent by 1988.<sup>22</sup>

But what about profitability? Don't falling prices equate to reduced profits? Isn't jumping from the certainty of price regulation into the unknown chaos of an unregulated competitive market sure to put downward pressure on net revenue? Aren't industries, and even individual companies, really better off in the shelter of command and control regulatory regimes? Doesn't investment in infrastructure increase under the certainty of rate regulation? The answer to all of these questions is: no.

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the TaxPayers' Alliance, for her assistance with research regarding the regulation of the European postal system in the 17<sup>th</sup> century. I also would like to thank Tyler Cox, Emilie de Lozier, Emanuel Gawrieh and Sarah Leggin for their research contributions.

<sup>17</sup> Motor Carrier Act of 1935, Pub. L. No. 74-255, 49 Stat. 543 (1935).

<sup>18</sup> CLIFFORD WINSTON ET AL., *THE ECONOMIC EFFECTS OF SURFACE FREIGHT DEREGULATION* 4 (1990).

<sup>19</sup> Robert E. Gallamore, *Regulation and Innovation: Lessons from the American Railroad Industry* in *ESSAYS IN TRANSPORTATION ECONOMICS AND POLICY: A HANDBOOK IN HONOR OF JOHN R. MEYER* 493, 493 (José Gómez-Ibáñez, William B. Tye & Clifford Winston, eds., 1999).

<sup>20</sup> Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976); Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980); Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980).

<sup>21</sup> Clifford Winston, *The Success of the Staggers Rail Act of 1980* 8-9 (AEI-Brookings Joint Center, Oct. 2005), available at <http://www.brookings.edu/research/papers/2005/10/railact-winston>.

<sup>22</sup> Clifford Winston, *U.S. Industry Adjustment to Economic Deregulation*, 12 J. ECON. PERSP. 89, 99 (1998).

History teaches us that profitability and investment tend to *increase* once the weight of regulation is lifted from the collective chest of industry. For example, rail's profitability gained steam after deregulation with its return on investment (ROI) nearly doubling.<sup>23</sup> Better yet, return on equity (ROE), or profit earned on shareholder investment, more than tripled in the early years after deregulation.<sup>24</sup> And investment was stoked by deregulation – railroads invested U.S. \$480 billion into network upgrades, or 40 percent of revenue, between 1980 and 2010.<sup>25</sup> All of this was achieved even though the U.S. railroad industry's rates are half of Europe's and are the lowest in the world.<sup>26</sup>

My use of the railroad and trucking example isn't a matter of cherry-picking the most useful scenarios. Deregulation in other networked industries benefited all involved as well. For instance, American airline deregulation that encouraged competition and allowed pricing freedom produced similar results: fares declined, revenues increased, consumers enjoyed more choices and were able to fly more.<sup>27</sup> Similarly, after the partial deregulation of the American telecom sector in 1996, markets witnessed lower prices, increased investment, more powerful innovation, and skyrocketing consumer adoption of new offerings.<sup>28</sup> Success has been especially robust in the American wireless sector because it has been lightly regulated since its inception.<sup>29</sup>

<sup>23</sup> Railroad's ROI averaged 4.9 percent from 1971 through 1980, compared with a 2.5 percent average between 1970 and 1979. U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-90-80, RAILROAD REGULATION: ECONOMIC AND FINANCIAL IMPACTS OF THE STAGGERS RAIL ACT OF 1980 34 (1990).

<sup>24</sup> Railroad's ROE, which averaged only 2.3 percent in the 1970s, climbed to 9 percent between 1971 and 1980. *Id.* at 35.

<sup>25</sup> ASS'N OF AM. RAILROADS, RAIL EARNINGS TODAY PAY FOR CAPACITY AND SERVICE IMPROVEMENTS FOR TOMORROW 1 (2011), available at <http://www.aar.org/~media/aar/Background-Papers/Rail-Earnings-Today.ashx>.

<sup>26</sup> ASS'N OF AM. RAILROADS, THE COST EFFECTIVENESS OF AMERICA'S FREIGHT RAILROADS 2 (2012), available at <http://www.aar.org/~media/aar/Background-Papers/The-Cost-Effectiveness-of-Freight.ashx>.

<sup>27</sup> From 1976 to 1982 alone, real fares fell by more than 9 percent. Compare U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1978 671, table 1134 (99th ed. 1978) with U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1984 633, table 1099 (104th ed. 1983). These figures are even more impressive considering fuel costs increased by 88 percent over the same period. *Id.* at 636, table 1103. Moreover, passenger traffic and, with it, industry revenues, have expanded. Specifically, total operating revenues grew from 37,629 million in 1975 to 37,629 million in 1985. See U.S. DEP'T OF TRANSP., RESEARCH & INNOVATIVE TECH. ADMIN., NATIONAL TRANSPORTATION STATISTICS table 3-22 (2011), available at [http://www.bts.gov/publications/national\\_transportation\\_statistics/pdf/entire.pdf](http://www.bts.gov/publications/national_transportation_statistics/pdf/entire.pdf) (total operating revenues in 1975 to 37,629 million in 1985. Additionally, the number of air carriers, both passenger and freight, approximately tripled between 1976 and 1983. Thomas Gale Moore, *U.S. Airline Deregulation: Its Effects on Passengers, Capital, and Labor*, 29 J.L. & ECON. 1, 5 (1986) (citing thirty-three certificated carriers in 1976, compared with ninety-eight in 1982). Many new entrants have made their presence known by operating as "low-cost" or "independent," like Southwest Airlines or Valujet (now known as AirTran). See Winston, *supra* note 22, at 93-94.

<sup>28</sup> For instance, local service providers doubled their revenues the year after the Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, 110 Stat. 56 (1996), was passed. See INDUSTRY ANALYSIS DIVISION, COMMON CARRIER BUREAU, FEDERAL COMMUNICATIONS COMMISSION, LOCAL COMPETITION (Dec. 1998), [http://transition.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/IAD/lcomp98.pdf](http://transition.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcomp98.pdf) ("Local Competition Report"). And, between 1996 and 2001, investment by telecommunications firms skyrocketed and capital stock increased at a rate that far exceeded the period

Examples of deregulatory phenomena are by no means limited to American success stories. Europe has also benefited from deregulation. Since the introduction of competition, the European freight rail market has enjoyed healthier growth and investment just as the European postal system did in the 17<sup>th</sup> century!<sup>30</sup>

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before the passage of the 1996 Act. *See id.* at 3-4; Lawrence J. Spiwack, *The Truth About Telecommunications Investment After the Telecommunications Act of 1996*, PHOENIX CENTER POLICY BULLETIN NO. 4, at 3-4 (2003), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=503364](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=503364). Additionally, the 1996 Act resulted in lowered prices and increased innovation. *See, e.g.*, Reed Hundt, *Ten Years Under the 1996 Telecommunications Act*, 58 FED. COMM. L.J. 399, 402 (2006); The Telecommunications Act of 1996, NTIA (Feb. 4, 1999), available at [http://www.ntia.doc.gov/legacy/otiahome/top/publicationmedia/newsltr/telcom\\_act.htm#LOCAL](http://www.ntia.doc.gov/legacy/otiahome/top/publicationmedia/newsltr/telcom_act.htm#LOCAL) (citing ECONOMIC REPORT OF THE PRESIDENT, ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISERS, U.S. Gov't Printing Office (1999), available at <http://www.gpo.gov/fdsys/pkg/ERP-1999/pdf/ERP-1999.pdf>).

<sup>29</sup> Today, the U.S. wireless industry directly or indirectly provides more than 2.4 million jobs and its economic contribution has grown more than five times faster than the overall economy (16 percent versus 3 percent). *See* CTIA-THE WIRELESS ASSOC., SEMI-ANNUAL 2011 TOP-LINE SURVEY RESULTS 10 (2012), [http://files.ctia.org/pdf/CTIA\\_Survey\\_Year\\_End\\_2011\\_Graphics.pdf](http://files.ctia.org/pdf/CTIA_Survey_Year_End_2011_Graphics.pdf) (“CTIA SEMI-ANNUAL 2011 SURVEY RESULTS”); *National Framework*, CTIA – THE WIRELESS ASSOC., [http://www.ctia.org/advocacy/position\\_papers/index.cfm/AID/12062](http://www.ctia.org/advocacy/position_papers/index.cfm/AID/12062) (last visited June 20, 2012) (“CTIA National Framework”). Since the 1996 Act, estimated connections in the wireless industry have increased from 44 million in 1996 to over 331 million in 2011, while average local monthly bills have decreased. Also, in 2011 alone, over \$25 billion was invested in United States’ wireless infrastructure. *See* CTIA-THE WIRELESS ASSOC., CTIA SEMI-ANNUAL WIRELESS INDUSTRY SURVEY (2012), <http://www.ctia.org/advocacy/research/index.cfm/AID/10316> (last visited June 19, 2012); CTIA SEMI-ANNUAL 2011 SURVEY RESULTS at 2, 10. According to the most recent FCC statistics, nine out of ten American consumers have a choice of at least five wireless service providers. *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, including Commercial Mobile Services, WT Docket No. 10-133, *Fifteenth Report*, 26 FCC Rcd 9664, 9669 (2011). As a result, American consumers enjoy low prices – 4 cents per minute – and high mobile usage rates. *See* Roger Entner, *The Wireless Industry: The Essential Engine of U.S. Economic Growth*, RECON ANALYTICS, at 1 (May 2012), <http://reconanalytics.com/wp-content/uploads/2012/04/Wireless-The-Ubiquitous-Engine-by-Recon-Analytics-1.pdf>).

<sup>30</sup> *Communication from the Commission to the Council and the European Parliament on Monitoring Development of the Rail Market*, at 6, COM (2007) 609 final (Oct. 18, 2007), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0609:FIN:EN:PDF> (reporting that, between 2000 and 2005, the Member States with non-incumbent railways witnessed a significant increase in freight rail performance than Member States in which the market was still dominated by a monopoly); *see also* Oliver Stehmann & Hans Zenger, *The Competitive Effects of Rail Freight Mergers in the Context of European Liberalization*, 7 J. COMPETITION L. & ECON. 455, 462 (2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1833323](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1833323). Member States that liberalized early recorded the biggest increases in freight rail volume between 1995 and 2004: the U.K. (70 percent), Netherlands (67 percent), Austria (36 percent), and Germany (24 percent). By contrast, output declined in Member States like France that shielded their incumbents from competition. *See Annexes to the Communication on the Implementation of the Railway Infrastructure Package Directives (‘First Railway Package’)*, at 64, COM (2006) 189 final (May 3, 2006), available at [http://ec.europa.eu/transport/rail/doc/communication\\_implementation\\_1st\\_rail\\_pack\\_annexes.pdf](http://ec.europa.eu/transport/rail/doc/communication_implementation_1st_rail_pack_annexes.pdf).

Furthermore, during the 30 years war (1618-1648), the decentralization of government undermined the previously monopolistic postal system. Where state monopolies were not enforced, wide diversity existed. For example, in 1695, postal customers in the Free City of Hamburg could choose among local postal entities affiliated with at least eight different regions and various private delivery services.

Hopefully, the point of these analogies is obvious. “Regulating my rival” is a seductive notion for many, but it only lures its victims to rocky shores before revealing itself as a perilous Siren call. Telecom companies should not look to regulate their “rivals,” Internet content and applications companies, down to their level – especially not through an intergovernmental body.

Instead, network operators should seek deregulation by their home governments to allow them full flexibility to produce and price freely in competitive markets. In fact, as history shows us, attempting to regulate rivals will only produce unintended consequences that will harm the companies advocating regulation. More importantly, consumers end up losing the most. In short, the opposite of what is desired will occur, something called “regulatory failure.” No government, let alone an intergovernmental body, can make economic and engineering decisions in lightning fast Internet time. Nor can any government mandate innovation. But new rules can undermine investment, innovation and job creation all too easily.

Despite these realities, resisting the temptation to regulate is difficult for many. Furthermore, deregulation can seem counterintuitive to some. We always hear talk of “market failure,” but we rarely see analyses of “regulatory failure.” Perhaps that is why, in the words of Professor Adam Thierer, “regulation *always* spreads.”<sup>31</sup> As world economies contract and government debt mounts, repeating the same government actions of regulating more and spending more of the public’s money will only produce the same results: shrinking economies and growing debt. It is time to reverse these trends, but doing so will require tremendous political courage.

We can start by avoiding any expansion of regulation to the Internet. Its phenomenal success can be traced directly to its *voluntary* and *self-governing* structure, the result of a multi-stakeholder process free from top-down governmental influences. In fact, policy makers should head in the opposite direction of the proposals outlined earlier. We should learn from the voluntary, bottom-up, self governance approach in the image of the non-hierarchical Internet itself, and look to apply this successful model elsewhere. Revolutionizing public policy through a fundamental modernization of legacy laws to clear away unnecessary regulatory obstructions will uncork the flow of investment

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Competition drove down costs. In 1712, a postal order was issued reiterating the governmental monopoly and reversing private post in Prussia. By 1720, other European states proposed the establishment of cooperative postal arrangements which would bypass Prussia, but serve the Danzig to Petersburg line. The other European states signed a treaty in 1723, which divided the routes amongst the states and included a promise to suppress independent postal carriers, returning postal carriage to a monopolistic state. See ELI NOAM, TELECOMMUNICATIONS IN EUROPE 8-13 (Oxford University Press, 1992) (for broader economic themes, see all of chapter 2).

<sup>31</sup> Berin Szoka & Adam Thierer, *Net Neutrality, Slippery Slopes & High-Tech Mutually Assured Destruction*, TECH. LIBERATION FRONT (Oct. 23, 2009), <http://techliberation.com/2009/10/23/net-neutrality-slippery-slopes-high-tech-mutually-assured-destruction/> (“The reality is that regulation *always* spreads. The march of regulation can sometimes be glacial, but it is, sadly, almost inevitable: Regulatory regimes grow but almost never contract.”).

capital, spark innovation, drive economic growth and propel job creation. Couldn't today's world economy benefit from such positive and constructive change?

On the other hand, dragging rivals down to the lowest common denominator of overly regulated international telecom companies will enshrine mediocrity at best, and, at worst, snuff out incentives to take risks and reap the resulting rewards, therefore killing opportunities to revitalize moribund economies and improve the human condition.

Thank you for having me here today and I look forward to learning from this fabulous conference.

Mr. WALDEN. At least I didn't have to take the code test again. We will now go to Mr. Feld of Public Knowledge. Good to have you back before the committee, Mr. Feld. Please go ahead with your comments.

#### STATEMENT OF HAROLD FELD

Mr. FELD. Thank you, Chairman Walden, Ranking Member Eshoo, for inviting me here to testify.

I am pleased to support H.R. 2669, the Anti-Spoofing Act of 2016, and H.R. 1301, the Amateur Radio Parity Act. Both bills are carefully drafted and narrowly tailored to address clear and pressing problems.

As a result, these bills may be seamlessly integrated into the Communications Act without unintended consequences. Unfortunately, the same cannot be said for the broadband bills under consideration.

Let me start with H.R. 2666, the No Rate Regulation of Broadband Internet Access Service Act. As everyone agrees, there is no evidence that the FCC plans to start regulating broadband prices.

Supporters support the bill from the fear that a future FCC may someday change the policy. Unfortunately, the broad sweeping language of H.R. 2666 virtually guarantees a host of unintended consequences that are bad for consumers and bad for competition.

The bill prohibits any FCC action under any law to "regulate the rates broadband providers charge for broadband access."

This would appear to prevent FCC enforcement action of laws against deceptive billing practices, deliberate overcharges or even outright fraud.

Further, although the bill's supporters claim it leaves the core protections of the FCC's net neutrality rules alone, it is easy to argue that enforcing the rule against paid prioritization or prohibiting providers from favoring their own content and services either directly or indirectly regulates the rates charged for broadband Internet access service.

Finally, the bill's broad sweeping language will disrupt the FCC's ongoing efforts to reform the Universal Service Fund. The proposed bill's broad sweeping language would force the FCC to halt and perhaps discontinue the already complicated process of making broadband in rural America affordable, as affordable, of course, is a price regulation.

Similarly, the proposed Small Business Broadband Deployment Act raises the spectre of significant unintended consequences.

Consider the impact on the millions of residential and small business subscribers the bill strips of the protections of transparency.

This puts every family-owned business at risk from fly-by-night providers that the proposed legislation will render unaccountable for incomplete and dishonest disclosure.

The proposed Small Business Broadband Deployment bill will create an incentive for small business broadband subscribers to select national providers over local small providers so that their businesses can enjoy the full protection of the transparency rule.

It would be ironic if, in the haste to protect small broadband providers from possible paperwork, the proposed bill accidentally

drives away the very small business customers these small providers need to survive.

Finally, the bill expands the size of the current FCC exemption to providers with up to 1,500 employees or 500,000 subscribers.

These providers, which most of us would consider mid-size providers rather than small providers, are already subject to the FCC's transparency rules. Nothing since the rules went into effect shows that these larger firms need relief.

Nevertheless, the bill strips millions of consumers and small business subscribers of valuable protections they currently enjoy.

Bluntly, before Congress strips millions of people of important protections against fraud and abuse, it should have clear evidence of a real need and should narrowly tailor the language to address that need.

At the very least, making the small business exemption through the commission's enhanced transparency rules is premature. The FCC has not yet finished its paperwork reduction analysis or adopted a final rule.

At a minimum, Congress should wait for the FCC to assess the burden estimates submitted by stakeholders and see whether the FCC adopts stakeholder suggestions such as those made by the ACA to minimize the estimated burden.

Let me conclude with this analogy. We have all experienced the frustration of downloading an update to our phone or laptop and discovering that a poorly written line of code has created a new security breach or caused key applications to crash.

The same unfortunate leak can happen with the Communications Act. Rushing to pass bills with broad sweeping language to address vaguely defined hypothetical problems will create bugs in our legal code that bad actors can exploit and will crash FCC efforts to bring affordable broadband to all Americans.

Congress should not release this legal software update until it has been thoroughly debugged and checked for compatibility with the existing operating system.

Thank you, and I am happy to answer any further questions you may have.

[The prepared statement of Harold Feld follows:]



**Testimony of Harold Feld  
Senior Vice President, Public Knowledge**

**Before the  
U.S. House of Representatives  
Energy and Commerce Committee  
Subcommittee on Communications and Technology**

**Hearing on:  
A Legislative Hearing on Four Communications Bills**

**Washington, DC  
Tuesday, January 12<sup>th</sup>, 2016**

**Testimony of Harold Feld  
Senior Vice President, Public Knowledge**

**Before the  
U.S. House of Representatives  
Energy and Commerce Committee  
Subcommittee on Communications and Technology**

**Hearing on:  
A Legislative Hearing on Four Communications Bills**

**Tuesday, January 12<sup>th</sup>, 2016**

Chairman Walden, Ranking Member Eshoo, thank you for the invitation to testify before this Subcommittee with regard to: H.R. 2669, the Anti-Spoofing Act; H.R. 1301, the “Amateur Radio Parity Act;” H.R. 2666, the “No Rate Regulation of Broadband Internet Access Act,” (“NRRBIAS” Act) and the as yet undesignated “Small Business Broadband Deployment Act” (“SBBD” Act). While Public Knowledge is pleased to reaffirm its support for the Anti-Spoofing Act, and to support the Amateur Radio Parity Act, Public Knowledge cannot support the two broadband-related bills. For reasons I shall elaborate on below, we believe that the question of what statutory limits Congress should impose on the Federal Communication Commission’s (“FCC” or “Commission”) broadband authority should be addressed in a comprehensive manner – preferably in the context of a re-write of the Communications Act as a whole.

In addition to this general objection, the proposed legislative language in H.R. 2666 raises specific concerns. While general discussion of “rate regulation” assumes traditional rate-of-return regulation as contemplated by Sections 203, 204 and 205 of the Communications Act, the broad language of H.R. 2666 would permit broadband providers to raise arguments against uncontroversial enforcement of traditional consumer

protections, such as fraudulent billing practices. Arguments over the scope of the statutory prohibition could undermine efforts to deploy rural broadband by complicating the already difficult process of updating the FCC's rules governing the Universal Service Fund.

Similarly, although the Small Business Deployment Act appears to be no more than an extension of the FCC's existing temporary suspension of the transparency rules to small broadband providers, it may have significant unintended consequences. Rural broadband subscribers and rural enterprise customers are no less in need of protection from fraud or fly-by-night providers than urban subscribers or urban enterprise customers. Customers worried that small businesses may evade accountability for fraudulent disclosure practices may flee to the arms of national providers subject to federal oversight. In rural markets, where consumers and enterprise customers frequently have no choice, they may find themselves at the mercy of local monopoly providers.

The FCC has long addressed the need to balance the limited resources of small providers against the need to protect all subscribers from fraudulent sales tactics or false billing scams. Nor does there appear to be any evidence that the FCC plans to move recklessly to impose onerous burdens on small businesses. For the time being, it appears that Congress should maintain watchful oversight rather than risk the unintended consequence of sweeping prohibitions.

**I. SUPPORT FOR ANTI-SPOOFING ACT AND AMATEUR RADIO  
PARITY ACT.**

The Anti-Spoofing Act

In July 2014, I testified on behalf of the predecessor Anti-Spoofing Act of 2014.<sup>1</sup> I am happy to re-iterate my support for the current anti-spoofing bill, H.R. 2669. The bill proposes common sense updates to the Anti-Spoofing Act of 2014 by including text messaging, and addresses a clear deficiency in the Act. The transition of the telephone network and the distribution of telephone numbers from traditional technologies to an all-digital platform brings enormous benefits to consumers. Unfortunately, it also provides new tools for those seeking to harass or defraud consumers. H.R. 2669 provides common sense updates to give law enforcement clear authority to address lawbreakers, while still respecting consumer privacy.

This is precisely the kind of non-controversial, bipartisan bill that should be the bread and butter of any Congress. The bill addresses a clear, demonstrated problem with carefully drafted provisions that find the often-elusive “sweet spot” between permitting innovation, avoiding undue burden on providers, respecting privacy concerns, and providing for vigorous consumer protection. Public Knowledge is pleased to endorse the H.R. 2669 and urge its swift passage.

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<sup>1</sup> See <http://docs.house.gov/meetings/IF/IF16/20140724/102541/HHRG-113-IF16-Wstate-FeldH-20140724.pdf>

The Amateur Radio Parity Act

Similarly, H.R. 1301 appears to be an important improvement to existing FCC regulation, designed to address the demonstrated needs of the amateur radio service. For over 100 years, the amateur radio service has played an important role in stimulating interest in radio communications and technology, as well as permitting millions of amateur radio volunteers to provide needed communications in aid of public safety.

The statute clearly follows the model of the FCC's pro-competitive and pro-consumer "Over the Air Receiver Device" (OTARD) rules. It responds directly to a long-standing, demonstrated concern on which the FCC has sought Congressional guidance. The bill's language will permit state and local authorities and private landowners to protect legitimate concerns, while prohibiting unnecessary burdens on amateur broadcasters.

Public Knowledge is therefore pleased to endorse H.R. 1301, and encourage its swift passage out of Committee.

**II. OBJECTIONS TO THE NO RATE REGULATION OF BROADBAND INTERNET ACCESS ACT AND THE SMALL BUSINESS BROADBAND DEPLOYMENT ACT.**

Public Knowledge cannot support either H.R. 2666, The NRRBIAS Act, or the SBBD Act. Unlike the Anti-Spoofing Act and the Amateur Radio Act discussed above, neither NRRBIAS nor SBBD responds to a clear, demonstrated need. They are, to use a rather cliché term in the network neutrality debate, "a solution in search of a problem." Nor do

the broad preemptions in either bill appear to undertake any significant effort to safeguard against unintended consequences of their sweeping language.

General Framework of Successful Congressional Oversight: Broad Principles Or Very Targeted Relief.

As Public Knowledge President Gene Kimmelman testified before the Senate Commerce Committee last year,<sup>2</sup> Congress best succeeds when it legislates around broad principles and allows flexibility for technological change. The Communications Act of 1934 has survived so long for the same reason that legislation based on fundamental principles – such as the Federal Trade Commission Act of 1914 and the Sherman Antitrust Act of 1894 – have survived for so long. It relies on broad principles enacted by Congress and flexible administration by an expert agency capable of handling rapid technological and economic change. This focus on fundamental values such as service to all Americans and consumer protection – rather than focusing on “clarity” and “certainty” around the issues of the moment – made the United States the undisputed leader in telecommunications policy and technology. We are the nation that put a phone on every farm. We are the nation that invented the modern wireless industry. We are the nation that invented the Internet.

In all these cases, Title II played a vital part in ensuring our global leadership. The *Carterfone* proceeding and the *Computer Inquiries* of the 1970s and 1980s made the modern Internet possible. They also demonstrate the value of rulemaking flexibility. Both

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<sup>2</sup> Testimony of Gene Kimmelman, President, Public Knowledge, Before the U.S. Senate Committee on Commerce, Science and Transportation, Hearing on Protecting the Internet and Consumers Through Congressional Action (January 21, 2015).

proceedings responded to changes in technology Congress could not have predicted in 1934 when it created Title II. Although *Carterfone* was initially a single adjudication, the Commission quickly found this constant case-by-case approach inherently unworkable and detrimental to the evolution of an independent customer equipment market. The Commission therefore shifted to its Title II rulemaking authority to create network attachment rules, a development widely praised as paving the way for such innovations as the answering machine (the predecessor to modern voicemail service), the fax machine, and ultimately the dial up modem – the necessary precursor to today’s Internet.<sup>3</sup>

Similarly, the FCC’s initial *Computer* proceedings that created the distinction between “enhanced services” (now “information services”) and telecommunications services took place against a background of changing technology. Again, the Commission first tried to distinguish between “enhanced services” and “telecommunications services” through adjudication<sup>4</sup>, and again this proved unworkable. Rather than providing the certainty necessary for businesses to innovate and technology to develop, reliance on case-by-case adjudication proved costly, time consuming, and confusing. As a consequence, the Commission adopted a set of bright line rules in its *Computer II* proceeding<sup>5</sup> that allowed a wide range of services, including the dial-up Internet, to flourish. As technology and the marketplace continued to evolve rapidly, the

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<sup>3</sup> FCC Office of Plans and Policy Working Paper #31, *The FCC and the Unregulation of the Internet* (July 1999).

<sup>4</sup> *Reg. and Policy Problems Presented by the Interdependence of Computer and Communications Services*, Final Decision, 28 FCC 2d 267 (1971) (Computer I).

<sup>5</sup> *In the Matter of Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384 (1980) (Computer II Final Decision).

Commission responded in the *Computer III* proceeding<sup>6</sup> by relaxing its rules to reflect the breakup of the Bell monopoly and their relevant changes.

When Congress has legislated to exercise appropriate oversight, it has generally recognized the need to preserve regulatory flexibility by enhancing rulemaking authority. Congress' actions in 1993,<sup>7</sup> which lay the foundation for the modern wireless industry, illustrate how Congress has exercised its responsibility for oversight and used its legislative authority to direct the Commission. For more than a decade, the FCC struggled to find the appropriate regulatory framework for mobile wireless voice services. The Commission relied on case-by-case adjudication to determine which services were subject to Title II and thus eligible for interconnection rights and access to phone numbers, and which services were not Title II and therefore not eligible for interconnection. (It is important to stress that the nascent wireless industry *wanted* to be classified as a Title II service to gain the pro-competitive benefits of Title II classification.)

The 1993 Act included numerous innovations.<sup>8</sup> Most importantly, Congress replaced the FCC's case-by-case adjudication with a regulatory classification for "commercial mobile radio service" (CMRS). While specifying the general principle for common definition, it explicitly required that the FCC define the statutory terms via

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<sup>6</sup> *In the Matter of Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Phase II Report and Order, 104 F.C.C.2d 958 (1986) (Computer III Phase II Order).

<sup>7</sup> Omnibus Reconciliation Act of 1993, Pub. L. No. 103-66, enacted August 10, 1993.

<sup>8</sup> For example, the 1993 Act gave the FCC the authority to conduct spectrum auctions, which it left to the FCC to define by rule subject to guidance from Congress on general principles. *See Id.* at § 309(j).

regulation. Congress also explicitly classified CMRS as Title II, but gave the FCC the flexibility to forbear from any provisions that it found unnecessary.

Finally, in 1996, Congress enacted the most sweeping reform of the Communications Act since its inception. In doing so, it benefitted tremendously from more than two decades of FCC rulemaking efforts to introduce competition into the voice and video marketplace. The 1996 Act did not abolish Title II or seek to eliminate FCC rulemaking authority. To the contrary, Congress depended on the FCC to use the combination of Title II rulemaking and forbearance both to shift the industry to a more competitive footing and to ensure that the fundamental values of consumer protection, universal service, competition, and public safety remained central to our critical communications infrastructure.

As these examples show, and as Congress has repeatedly recognized in its periodic updates of the Communications Act, rulemaking authority provides critical flexibility for the Commission to adapt existing rules to rapidly evolving technology and the ever shifting marketplace. A statute captures a single moment in time. It works best, therefore, when focused on broad and timeless principles – fundamental values such as consumer protection, competition, universal service, and public safety – rather than trying to account for every single detail.

The one exception to this pattern was when Congress passed the Cable Act of 1984.<sup>9</sup> In an effort to provide “certainty” and “clarity,” Congress stripped both the FCC and local franchising authorities of the bulk of consumer protection authority. Congress instead included specific provisions to address the handful of specific issues that had

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<sup>9</sup> Cable Communications Policy Act of 1984, Pub. L. No. 98-549 (1984).

emerged in the 15 years the FCC had regulated cable pursuant to its ancillary authority. Congress assumed that by legislating in detail, and addressing the problems immediately before it, the 1984 Cable Act would promote both competition and innovation to the benefit of consumers.

Instead of promoting competition and innovation to the benefit of consumers, the 1984 Cable Act created a concentrated industry marked by escalating prices and poor customer service. Cable operators, free from regulatory oversight, worked quickly to crush incipient competition and leverage their control over programmers. The situation deteriorated so rapidly and thoroughly that, after only eight years, Congress enacted an almost complete and sweeping reversal of its 1984 legislation. The Cable Television Consumer Protection and Competition Act of 1992,<sup>10</sup> unlike its 1984 predecessor, empowered the FCC to address anticompetitive practices and promote competition in broad terms.

For these reasons, Public Knowledge urges members of the Subcommittee to proceed cautiously. There is no doubt that Internet has become the central communications platform of our nation. All other communications services -- whether traditional broadcast radio and television, video services such as cable or traditional telephone voice service relying on traditional telephone numbers -- now travel over the Internet as well as over their traditional transmission media. Since the 1996 Act, the FCC has carefully managed the competing goals of ensuring a stable and reliable platform for communications and public safety, while maintaining sufficient flexibility to promote innovation and competition. Likewise, the FCC has consistently sought to balance a

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<sup>10</sup> Pub. L. No. 102-385 (1992).

“light touch” regulatory environment with providing adequate protection for consumers and stimulating the development of competing services.

As the last major overhaul of the Communications Act turns 20 years old next month, Congress has a wealth of material to develop and study. The Commission’s reclassification has not created the catastrophe that some have feared, nor has it prompted the ITU usurpation of Internet governance that others predicted. Chairman Walden, in concert with Full Committee Chairman Upton, began a long-term project in 2013 to begin the deliberative process of review for the Communications Act as a whole. Public Knowledge was an active participant in that process. It is precisely through such deliberative processes that Congress has achieved its most successful reforms of the Communications Act. Given the centrality of the Internet to all aspects of our communications infrastructure, this Committee should continue to follow the comprehensive and deliberative process initiated by Chairman Upton and Chairman Walden.

The Proposed Broadband Bills Are Not Targeted To Any Existing Danger.

Congress does not, of course, put all legislation on hold until it is ready to engage in a comprehensive review of the entire statute. Public Knowledge’s endorsement of H.R. 1301 and H.R. 2669 recognize that, when facts demonstrate a clear need, Congress should not hesitate to act. But even in these cases, the complicated and interconnected nature of telecommunications requires precision drafting, based on a clear record, so that Congress can craft targeted relief that avoids unintended consequences.

Neither the NRRBIAS Act of the SBBB Act meets these criteria. To the contrary, in both cases the bills propose premature action without careful consideration of the many possible unintended consequences. There is no evidence of any sign that the FCC intends to impose rate-of-return regulation on BIAS providers. At the same time, the broad, sweeping language these two bills employ would complicate efforts to protect consumers and small businesses from blatantly fraudulent and anticompetitive practices.

#### Concerns With NRRBIAS Act

H.R. 2666 states:

Notwithstanding any other provision of law, the Federal Communications Commission may not regulate the rates charged for broadband Internet access service.

This language gives no limit to what is meant by “regulate the rates.” The use of the even broader language “notwithstanding any other provision of law” lends itself to an interpretation that would include enforcement of the rules supposedly left untouched as indirectly “regulating” rates.

For example, thousands of consumers have complained that Comcast has consistently provided them with inaccurate information about their data consumption, billing them for broadband data they did not use.<sup>11</sup> Would FCC investigation into these complaints count as “rate regulation” prohibited by the statute? While no one has suggested any intent by Congress to leave consumers vulnerable to blatant billing

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<sup>11</sup> Daniel B. Kline, “Why Does Comcast Have More FCC Complaints Than AT&T, Verizon and TWC Put Together,” The Motley Fool (January 2, 2016). <http://www.fool.com/investing/general/2016/01/02/why-does-comcast-have-more-fcc-complaints-than-att.aspx>

misconduct, the broad language here could be interpreted as preventing the FCC from investigating any such complaints, or from ordering ISPs overcharging subscribers to cease such practices. Similarly, although the language limits itself to regulating “rates charged for broadband Internet access service,” would the language prohibit the FCC from taking complaints with regard to interconnection for broadband services, or prohibit special access reform? While these do not *directly* regulate the rates for broadband access service, opponents can argue that action would *indirectly* “regulate rates.”

Such sweeping language may interfere with the FCC’s efforts to reform the Universal Service Fund to bring broadband to rural America and to those who cannot afford broadband. The proposed NRRBIAS Act prohibits any form of rate regulation, “*notwithstanding any other provision of law.*” This broad language certainly includes the statutes governing the High Cost and Lifeline funds established under Section 254. Opponents of these reforms have already objected that the FCC’s reforms constitute rate regulation. Although the 10<sup>th</sup> Circuit Affirmed the FCC’s reforms on the High Cost fund in 2014, passage of NRRBIAS would allow those who lost a “second bite at the apple,” further delaying efforts to deploy broadband to rural America.

It is important to stress that none of these interpretations need to succeed in court to have a chilling effect of consumer protection or USF reform. But the broad and sweeping language used by H.R. 2666 invites all manner of objections to any efforts to protect consumers, reform special access, or even to reform USF to make rural broadband more available and affordable. After all, making something “more affordable” through government subsidy is arguably as much an effort to “regulate the rate” of broadband access service as a rate cap.

Given that both Republicans and Democrats have stressed the need for certainty, this Subcommittee should be wary of introducing such dramatic uncertainty by passing such a broadly worded bill.

Concerns With The SBBD Act.

The Small Business Broadband Deployment Act likewise imposes a fairly substantial change in the law without much evidentiary need for such action. No one has submitted information on whether the existing transparency regulations impose significant costs, in what way they might impose significant costs, and would could be done to mitigate these costs while still providing adequate protection for consumers. While it is certainly the case that administrative burdens larger providers find trivial can impose significant burdens on small providers, no one has provided any credible evidence that the FCC is prepared to act with indifference to these concerns.

To the contrary, the FCC has acted with sensitivity to the concerns of small providers about potential regulatory burdens. Rather than impose the enhanced transparency and reporting requirements, the FCC has waited to see whether it needs to act.

If future events show that additional enhanced transparency requirements are needed to protect consumers and enterprise subscribers – particularly in rural areas where small providers are often the most affordable option – the FCC should have authority to tailor the necessary transparency protections to the situation. While there is no doubt that the vast majority of small broadband providers are local businesses interested in

providing much needed services to their communities at fair prices, every business has its share of fly-by-night operators and scammers. If Congress creates a safe harbor from transparency obligations, it will encourage entry by those intent on defrauding subscribers or enterprise customers posing as legitimate small broadband providers.

Additional safeguards already exist to prevent the FCC from accidentally overburdening small businesses. FCC action is subject to review by OMB under the Paperwork Reduction Act and similar statutes. In the absence of any immediate evidence that the FCC is preparing to impose new transparency regulations, the pro-consumer and pro-competitive value of transparency regulations, and the additional safeguards provided by the Paperwork Reduction Act and other general provisions of law, Congress should maintain a “wait and see” approach while the agency continues to do its job and build the necessary record.

Finally, Public Knowledge notes that the proposed bill would dramatically expand the number of subscribers of a “small” provider from 100,000 to 500,000. Nowhere has there been any claim that providers with 500,000 subscribers face the same constraints as those currently covered by the FCC’s existing exemption. By expanding the number of customers a small provider may have by five-fold, without any explanation or evidentiary record for the increase, the proposed statute would deprive as many as 13 million Americans of the benefits of enhanced transparency with no proof of any offsetting gain.

Indeed, the statute may create a perverse incentive for enterprise customers and sophisticated subscribers to select large businesses over smaller, local businesses. These customers have a greater need for transparency and full disclosure, and are therefore more likely to select larger providers subject to FCC accountability for enhanced

transparency. It would be an unfortunate irony if, in the haste to protect small providers from imaginary burdens, Congress created a real incentive for the most valuable customers to avoid small providers in favor of larger ones because of the increased level of consumer protection.

In the event real problems do begin to emerge, Congress can act swiftly to address them with targeted relief that strikes a proper balance between competing concerns. That is what Congress has done with both the Anti-Spoofing Act and the Amateur Radio Act. Congress should follow this same approach here.

### **Conclusion**

In exercising its proper oversight role of the Federal Communications Commission, Congress has achieved the greatest success when legislating in broad principles while allowing the Commission to develop rules tailored to the complicated and dynamic communications marketplace. Additionally, when experience shows the need to provide a statutory correction, it has benefited from development of the record by the FCC before acting. This has allowed Congress to act with precision, avoiding unintended consequences.

Both the Anti-Spoofing Act and the Amateur Radio Act are examples of this successful, deliberative approach. By contrast, the proposed NRRBIAS Act and the proposed SBBD Act are both premature and sweeping in scope, a combination that maximizes the likelihood of unintended consequences that would harm consumers, damage competition, and delay efforts to facilitate rural broadband deployment.

Thank you for inviting me to testify. I look forward to answering your questions.

Mr. WALDEN. Thank you, Mr. Feld.

We will now go to Ms. Bowles. Thank you for being here. We look forward to your testimony as well.

#### STATEMENT OF ELIZABETH BOWLES

Ms. BOWLES. Thank you for having me.

Chairman Walden, Ranking Member Eshoo, members of the subcommittee, I appreciate the opportunity to be here today. I am going to limit my remarks in the interest of time to the H.R. 2666 and the Small Business Broadband Deployment Act.

WISPA represents the interests of more than 800 providers all over the United States and my company, Aristotle, provides broadband service to approximately 800 residential and business subscribers in central Arkansas including small underserved rural Arkansas communities such as Sardis, Vilonia, and Shannon Hills.

Our members use unlicensed spectrum primarily to provide broadband to underserved areas that are not cost effective for traditional wireline companies to serve and they operate in diverse communities like Scott, Arkansas, Stony Bridge, Ohio, and La Grande, Oregon, all of which are very small towns. Scott, for example, has 72 people.

There are hundreds of other places where service from a WISP may be the only terrestrial means to access the Internet and the vast majority of our members have built their networks without the benefit of federal subsidies.

Under any definition, nearly all of WISPA's members including my company are small businesses. Some WISPs have only a handful of employees who do everything from climbing the towers to doing the accounting to customer service.

According to the FCC, 17 broadband access providers serve 93 percent of the population. The remaining 7 percent—21 million people—is served by the over 3,000 broadband Internet access providers that are considered small ISPs.

As Congresswoman Eshoo said, what is going on in rural America is critical. We have to get broadband into rural America and the 3,000 small ISPs are bringing that service to those people.

WISPA believes in an open Internet and in the effectiveness of the 2010 "light touch" regulatory regime. My company has never throttled, never capped usage nor required anyone to pay to prioritize traffic.

The FCC's reclassification of broadband as a Title II service was misguided and WISPA is concerned about the effects that the 2015 order will have on small businesses.

My company is already feeling the impact of the FCC's rules. Because of the risks and costs imposed by the order, Aristotle has reassessed its plan to expand its service pending the clarification of the regulatory regime.

Instead of expanding our network to cover a three-county area, we are now deploying in three smaller communities. We cannot justify a greater investment in light of regulatory uncertainty.

Small businesses, those with providers of 100,000 or fewer, are temporarily exempt from the new enhanced disclosure requirements. But the uncertainty still exists.

The FCC's decisions may have provided short-term relief but the agency failed on two occasions to make the exemption permanent despite an overwhelming record supporting that move.

First of all, the FCC received not a single comment alleging that small ISPs were flaunting the 2010 disclosure rules or that those rules were insufficient to protect consumers.

In fact, the records show that consumers, including rural consumers, will bear the cost burden as small businesses are forced to pass on additional regulatory compliance costs.

The FCC failed to consider adequately the cost that will be imposed on consumers which in turn led to the flawed decision to impose a one-size-fits-all regulatory regime that penalizes small business.

Second, the FCC failed to analyze properly the impact on small businesses required by the Paperwork Reduction Act. It estimated with no supporting facts that the burden on small business would be less than that on larger businesses.

That conclusion failed to grasp that small ISPs do not have in-house lawyers to review and understand the new disclosure rules, do not have the administrative staff to maintain the ongoing compliance or the means to measure packet loss.

Every dollar a small business spends on unnecessary regulatory compliance is a dollar not being spent on new hires, network upgrades and expansion.

Third, the record in the follow-on proceeding overwhelmingly supported a permanent exemption. Not a single one of the millions of consumers who wrote in to the FCC in the months before open Internet was adopted wrote to oppose a permanent exemption.

The FCC has had two opportunities to get it right and we would not be here today if the FCC had followed the clear record. But they didn't, and now small ISPs face the prospect of more FCC proceedings and continuing uncertainty.

As I sit here today, WISPA members have been declined funding. One of our members in Oregon was told by his bank that he would not be funded because they were uncertain about the regulatory regime.

Other WISPA members have changed their business plans, cut back or redirected investment funding and ordered a higher regulatory counsel.

The reality is clear. Imposing excessive and unnecessary burdens on small ISPs has dampened the very investment that has made broadband service to rural America possible.

And as for rate regulation in H.R. 2666, WISPA supports any legislation that would prevent the FCC from regulating the rates we charge our subscribers.

Thank you.

[The prepared statement of Elizabeth Bowles follows:]

**Written Testimony of**

**L. Elizabeth Bowles  
Legislative Committee Chair, Wireless Internet Service Providers Association  
President, Aristotle, Inc.**

**Before the House Energy & Commerce Committee  
Subcommittee on Communications and Technology  
“A Legislative Hearing on Four Communications Bills”**

**January 12, 2016**

Chairman Walden, Ranking Member Eshoo, and Members of the Subcommittee: My name is Elizabeth Bowles, and I am a past President and current Legislative Committee Chair of WISPA, the Wireless Internet Service Providers Association, which is the trade association for the fixed wireless industry. I am also the President of Aristotle, Inc., a fixed wireless Internet service provider, or WISP, based in Little Rock, Arkansas. I am pleased to be here today as both a spokesperson for a trade association that represents the interests of small businesses as well as the President of a small business that provides broadband service to approximately 800 residential and business subscribers in Central Arkansas, including the greater Little Rock area, as well as small, underserved Arkansas communities such as Sardis, Vilonia, and Shannon Hills.

WISPA represents the interests of more than 800 providers of fixed wireless broadband services that serve customers in every state. Our members primarily use unlicensed spectrum to provide broadband to underserved, rural, and remote areas that are not cost-effective for traditional wireline companies to serve. Our member companies operate in diverse communities like Scott, Arkansas (population 72), Stony Bridge, Ohio (population 411), and LaGrande, Oregon (population 13,074) – and hundreds of other places where service from a WISP may be the only terrestrial means to access the Internet – and we are able to offer broadband by placing transmission equipment on water tanks, granaries, towers, and whatever vertical infrastructure is

available. The vast majority of our members have created and built their networks without the benefit of any Federal subsidies. So – unlicensed spectrum and unsubsidized service to otherwise unserved communities. I guess that makes us unconventional.

Under any definition, nearly all of WISPA’s members -- including my company, Aristotle -- are small businesses, “mom and pop” ISPs started by local, community-minded entrepreneurs that saw a need for broadband in their communities. Funded by friends and families, some WISPs may have only a few hundred customers and a handful of employees who “do it all” – climbing towers, marketing, providing customer service. According to the FCC, only 17 broadband Internet access providers serve 93 percent of the population. This means that over 3,000 broadband Internet access providers – whether wireless, cable, or telephone company – serve the remaining seven percent, the seven percent that is hardest to reach. Seven percent of 300 million is 21 million people. This is not an insignificant number, and without providers like my company, these Americans would be left without adequate terrestrial broadband entirely.

WISPA believes in an open Internet under the “light touch” regulatory regime the FCC implemented in 2010. Aristotle has never throttled, nor has my company capped usage or required customers or anyone else to pay to prioritize traffic. We believe the FCC’s reclassification of broadband as a Title II service was misguided, as are many of the rules the FCC adopted in its 2015 Order, such as the Internet conduct standard and the enhanced disclosure rules. WISPA joined the lawsuit seeking to overturn the FCC’s Order because WISPA is concerned about the effects that the FCC’s decision will have on small businesses. These effects include defending against frivolous complaints and class actions, and potentially having our rates regulated.

Indeed, my company is already feeling the impact of the FCC's rules. Projects that were viable investments under the 2010 regulatory regime may no longer provide sufficient returns to justify the investment. Because of the risks and costs imposed by the Order, Aristotle is reassessing its plans to expand our service into unserved areas of rural Arkansas. Before the Order was adopted, it was our intention to triple our customer base by deployment of a redundant fixed wireless network that would cover a three-county area. However, we have pulled back on those plans, scaling back our deployment to three, smaller, communities that abut our existing network. Aristotle is uncomfortable with the risks the FCC's new rules may impose on us and concerned about the expense of complying with those rules.

#### **Small Business Exemption**

In the Open Internet Order adopted in February of 2015, the FCC temporarily exempted small broadband providers from the new "enhanced" disclosure requirements. On December 15, 2015 – the day the exemption was set to expire—the FCC extended the exemption for another year. In each case, the FCC defined a small business eligible for the extension as a broadband Internet access service provider with 100,000 or fewer connections. While the FCC's decisions provide short-term relief, the agency failed on two occasions to make the exemption permanent, despite an overwhelming record that showed the following:

*First*, throughout an extensive (albeit flawed) FCC process that resulted in four million written contributions from the public, the FCC received not a single comment that small ISPs were flaunting the 2010 disclosure rules or that those rules were insufficient to protect consumers. To the contrary, the record showed that small businesses would be forced to pass on the additional costs to consumers—including consumers in rural areas—who are the very people that not only would benefit most from having broadband service in the first place, are also the

least likely to be able to afford that cost. In other words, the FCC failed to consider adequately the costs that will be imposed on consumers, which in turn led to the flawed decision to impose “one size fits all” regulatory burdens on the small broadband providers that serve those consumers. In the absence of evidence of consumer harm at the hands of small ISPs, there is no basis for the FCC to impose new rules.

*Second*, the FCC failed to analyze properly the impact on small businesses when, as required by the Paperwork Reduction Act, it estimated the burdens its new rules would have on businesses, large and small. The FCC actually wrote:

small entities may have less of a burden, and larger entities may have more of a burden than the average compliance burden. This is because larger entities serve more customers, are more likely to serve multiple geographic regions, and are not eligible to avail themselves of the temporary exemption from the enhancements granted to smaller providers.

This statement fails to grasp some simple facts. Small ISPs do not have in-house lawyers to review and understand the new disclosure rules, administrative staff to maintain the ongoing compliance, or the means to measure packet loss. Moreover, every dollar spent on unnecessary regulatory compliance is one dollar that is not being spent on new hires, network upgrades, and expansion. It is one thing for a large broadband provider with its army of lawyers to devote time and resources to the new requirements, and quite another for a WISP in West Yellowstone, Montana, to do the same.

*Third*, the FCC ignored an entirely one-sided record when it granted the one-year extension of the small business exemption rather than making that exemption permanent. The record overwhelmingly supported a permanent exemption, and not a single one of the millions of consumers who wrote to the FCC in the months before the Open Internet Order was adopted wrote in to oppose a permanent exemption.

*Fourth*, throughout this entire process, the FCC ignored the wisdom of the Small Business Administration and the requirements of the Regulatory Flexibility Act, both of which exist to protect small businesses from burdensome regulation. The record did not support the FCC's actions, so rather than act in accordance with the record, the FCC "punted" – perhaps in the hopes that it could get a record more favorable to the positions it wants to take.

The FCC has had two opportunities to get it right. In the Open Internet Order, it could have relied on comments and letters submitted by WISPA, other trade associations, and hundreds of small broadband providers that asked the FCC to make the exemption permanent, but it did not. Later, in the follow-on proceeding, the FCC could have made the exemption permanent, but it did not – it approved only a one-year extension. If the FCC had followed the record in either instance, we would not be here today asking Congress to step in. Instead, small ISPs face the prospect of more FCC proceedings and continuing uncertainty that divert time and resources away from innovating, investing, and expanding broadband networks to meet the demand of rural and underserved Americans.

When WISPA met with the FCC prior to the enactment of the Open Internet Order, the FCC discounted WISPA's stated concerns about the uncertainty caused by a new regulatory regime and ignored WISPA's plea that small businesses be exempt from the Order. Now, as I sit here today, WISPA has members whose banks have stated point-blank that they will not make a loan until the regulatory uncertainty can be cleared. Other members have cut back or redirected investment funding in order to hire regulatory counsel. Still others have paused expansion plans waiting to see how the changing regulatory landscape will affect them. Regardless of the FCC's opinion, the reality is clear: imposing excessive and unnecessary burdens on small ISPs has dampened the very growth and investment that has made broadband service to rural America

possible. At the end of the day, it will not be the FCC or even the small businesses that pay the ultimate price for the FCC's myopic insistence on this course of action, it will be American consumers who will foot the bill – either in the form of increased costs to fund their provider's regulatory compliance burdens or – even worse – in the form of no broadband service at all because those same small ISPs must divert investment in those communities in order to meet their new regulatory burden.

#### **Rate Regulation**

WISPA also supports legislation that would prevent the FCC from regulating the rates we charge our subscribers. Under Title II, our charges must be “just and reasonable,” and any party can take us to court if they think that we are violating this standard. This is a very scary proposition for small businesses, who simply will not be able to afford to go through the process of defending frivolous complaints or participating in a lengthy judicial process to adjudicate what is “reasonable.” The FCC provided no helpful guidance on what evidence it would look to in making a determination of what constitutes “reasonable” rates. While it is somewhat comforting that the FCC does not intend to regulate rates retroactively, who is to say what a Court would do, or what a future FCC might do? And even imposing rate regulation on future activity could have a devastating effect on our ability to fund expansion or, in the worst case, even to stay in business.

In competitive markets where there is more than one broadband provider, the market will determine the reasonableness of rates. That is the essence of a free market economy, the kind that built the Internet. In markets where there may be only a single provider, there are two scenarios: the provider is subsidized by the government, or – as in our case – the barriers to entry are low enough that affordable service can be provided without government assistance. If the

broadband service offered by a WISP or other small ISP is not affordable, or if our customer service is sub-optimal, then we would not stay in business.

Eliminating the prospect of rate regulation will, especially for small ISPs, remove a significant component of regulatory uncertainty, and will help to re-open the door to more extensive innovation and deployment. The “virtuous cycle” exists only if there are broadband providers in it.

**Conclusion**

In seeking to regulate in the absence of legislation, the FCC lost its way. Congress can right these wrongs by making the small business exemption permanent and by banning broadband rate regulation.

Mr. WALDEN. Ms. Bowles, thank you for your testimony, and to all of our witnesses, thank you.

I would like to go back to you and start off the questioning. Having been a small business owner with my wife for 20 years in the broadcast business—we are out of it now for more than, well, quite a while—I know what it was like to deal with government regulations and all of this.

Can you tell us what does it really mean to you if you had to comply with these new transparency rules? Fundamentally, what does that mean?

What would you have to start monitoring and doing and reporting and the kind of staff levels that would take and what it takes away from expanding your service?

Ms. BOWLES. Well, what it means specifically is we have to get our arms around what the regulations actually require us to do and I don't have a grasp of that because my company has never been under Title II and I don't know which of these provisions are locking and loading and which of them are not.

So there has to be an analysis done over what applies and what doesn't apply.

Mr. WALDEN. OK.

Ms. BOWLES. And there is a lot of conversation on the list from our members asking just those questions—what does this mean, what does it mean that I have to do a transparency statement, what does it mean that I need to be more open, what does it mean that I have to make my rates available? They don't actually understand what the regulation is saying.

So that is an expense. I need regulatory counsel to explain even what I am doing and then there is an ongoing regulatory compliance burden.

And I didn't have a chance to really get into it but in addition to that there is the threat of litigation because if there is a problem in the net neutrality statement or if there is a reason that a consumer feels that they are not being dealt with frankly, then there is a potential risk of litigation. So I need counsel to deal with that as well.

One member got a quote from \$40,000 is what it would cost them. That is the cost of deploying a tower. So I am looking at choosing between deploying a tower into a rural community or hiring regulatory counsel.

Mr. WALDEN. All right.

Mr. McDowell, in a letter to the committee yesterday, Commissioners Pai and O'Rielly expressed their concerns with the process by which the FCC decided to extend the exemption, focusing primarily on the lack of a cost benefit analysis prior to adoption of the rules and the use of the Paperwork Reduction Act process as an excuse to delay a final decision.

How could a thorough cost benefit analysis in this situation have benefited the final rules?

Mr. McDOWELL. Well, it would glean facts and analyses that would help the commission render a final decision. So actually the commission sort of got the cart before the horse if it is going to adopt a rule and then do the analysis rather than doing the analysis and then decide whether or not to adopt the rule.

But it seems to be the intent of the commission to at least have a temporary exemption, and if it is going to be a temporary exemption why not make this a permanent exemption.

So there appears to be enough evidence in the mind of the majority of the commission that there is an undue burden on these smaller companies such as WISPs and others so why not make that the permanent public policy.

Mr. WALDEN. And by the way, the size of the exemption that we picked for the draft legislation or the proposal we are talking about here is actually the federal government's definition of a small business.

It is the SBA that comes up with this, size of provider. So if you are going to have a small business exemption then we ought to have one standard is the theory here and the government already sets that standard.

Does this kind of—and I will get to the rate regulation issue and the issue of post facto rate regulation—does that, Mr. McDowell, limit innovation?

I am concerned that companies will be unwilling to create new products or engage in new services if they are uncertain as to how they will be received by the agency after the fact.

I am concerned that inquiries like the commission's recent request to the wireless providers for information on sponsored data plans will create a mother-may-I environment for innovation.

Is that a legitimate concern?

Mr. MCDOWELL. It is. I mean, let us let history be our guide real quickly. Under the Carter administration airlines were deregulated—prior to that, trucking and railroads as well—from common carrier rate regulation.

And what we found was the opposite of what all the critics of that said happens. So rates went down for consumers.

Quality went up. Investment went up. Transit time shrunk. So in other words, the consumer experience got better at a lower cost with more investment.

So that tells us a couple of things, and by the way, similar effect after the 1996 Telecom Act, which was partially deregulatory, and this has happened in Europe with railroads and telecoms and other contexts, too.

That tells us that rate regulation, by the way, keeps rates artificially high and inhibits constructive risk taking and investment.

And I kept on my desk at the FCC my grandmother's black rotary dial phone from St. Angelo, Texas, to remind me of the innovation you get from Title II in general and rate regulation and that was the state of the art for decades—the black rotary dial phone.

Mr. WALDEN. Yes. Indeed. All right. My time is expired.

I thank our panelists again for your comments and your answers to our questions and I will turn to my friend from California, Ms. Eshoo.

Ms. ESHOO. Thank you, Mr. Chairman, and thanks again to the witnesses for your fine testimony.

I want to go to Ms. Bowles first. It is my understanding that there is a—you spoke of, essentially, time and cost of time and rural areas and the number of customers.

And I don't know what is based in actual facts, though. It seemed as if we are afraid of some big boogeyman out there and we think that this might happen and therefore we need a law.

And laws are a big deal. They are a big deal. So some have told me that these revisions are estimated to develop and draft and revise the disclosures would require an annual expenditure of 16 to 24 hours.

You are talking about having to hire suites of lawyers. I don't know what other word to use. It sounds like an exaggeration to me. Now, burdens are burdens and small businesses are small businesses.

What is the largest outfit that you represent? How many employees do they have?

Ms. BOWLES. I actually don't know the number of employees. They have 200,000 subscribers.

Ms. ESHOO. Two hundred thousand subscribers.

Ms. BOWLES. And they are probably ten times larger than the next largest WISP and the average WISP is between 1,500 and 2,000 subscribers.

Ms. ESHOO. So the largest of who you represent has 200,000 subscribers?

Ms. BOWLES. Yes.

Ms. ESHOO. Nothing larger than that?

Ms. BOWLES. Not at this time. But they are continuing to grow.

Ms. ESHOO. Well, on this whole issue of what the burden would be if it is 16 to 24 hours, as has been reported to me, that is about 2.9 seconds a day per year.

That doesn't seem—see, what I am worried about the end result on the consumers and it is being said well, they are going to call—they are going to want to have a question answered.

That is the life of a business. You don't have a business unless you have customers. Customers are always going to have questions.

So I just want to make sure in this and I am not sure from your testimony that it really is clear that the very customers that are consumers don't end up being screwed somehow, in plain English.

I have every empathy and respect for small businesses. I am the daughter of a small business owner. I worked in that business with my father. But I do think that there needs to be a balance.

So I think we are going to have to get more information from you because there seems to be an overstatement, in my view, of the case and if the largest number of those served is 200,000, I don't think the burdens that you are talking about, it doesn't seem to fit.

So we are going to be able to ask more questions in writing and I plan to do that. So thank you.

To my friend, Commissioner McDowell, in your statement you stated that the no-rate regulation legislation would be improved by clarifying two ambiguities.

In your view, could the current language impact the FCC's ability to take action on special access or USF reform?

Mr. MCDOWELL. Well, I think clarity is always good coming from Congress to the FCC.

Ms. ESHOO. Right.

Mr. McDOWELL. So if you have concerns really on any issue I think there are probably a whole host of friendly amendments that could help clarify. So—

Ms. ESHOO. I think, Mr. Chairman, that is what I was referring to in my opening statement. So I think that that is an area that we should work on relative to Mr. Kinzinger's legislation so that there is real clarity.

To Mr. Feld, by the FCC's own data on the small business Broadband Deployment Act, it represents over 11 million households.

Do you think it is premature that these rules will have a deleterious effect on broadband providers without a determination of what the actual burden is on small businesses?

Mr. FELD. I do think this is premature and that Congress will definitely benefit from allowing developments to move forward. The FCC is in the middle of its evaluation process.

I am sympathetic to the problems and burdens for small business and this is not the first time the FCC has dealt with the very difficult question of how do you balance the needs of the customers, which include many small businesses, and the needs of the small providers who are, clearly, not in the same place as a Comcast or an AT&T where they can do these things trivially.

Nevertheless, I also just would like to point out that oftentimes when there is a change in regime people are concerned. They have a tendency to look at oh my god, all of these terrible things are going to happen, to think about worst-case scenarios and, ultimately, these things work out.

And I do think that Congress will have significant opportunity—the FCC will have significant opportunity to recalibrate if things do not work out.

But I do think that we need a record before we move forward, particularly in light of the potential unintended consequence to consumers and small businesses.

Ms. ESHOO. Thank you very much.

Mr. WALDEN. Just for the record, our legislation has nothing in it advocating regime change.

We will now go to Ms. Blackburn.

Mrs. BLACKBURN. Thank you, Mr. Chairman.

Chairman McDowell, I want to come to you for just a couple of points. I am concerned about private sector investment, and as we look at 3.9 billion network devices by the time we get to 2019, which is not my number, not your number—it is a number that the experts give us—and we look at a billion dollars in investment that has already taken place by the private sector to handle broadband expansion.

And one of the things those of us that have constituents that live in underserved areas when it comes to high-speed Internet—one of the things we constantly hear is when is this going to reach us.

And we know the fastest path is primarily through private sector investment and the ability to do this. But my concern is as you look at the private sector investment the effect that having the FCC's authority to do rate regulation, having that sitting out there undefined, not being corralled, if you will, the effect that that is going to have on that investment.

And I would like to know if you all have looked at what you think the decrease in private sector investment will be for expansion and building out these networks if the FCC takes this authority and runs with it.

Mr. MCDOWELL. Thank you for the excellent question.

And now that I am in the private sector I work a lot and talk a lot with investors and market analysts, both sort of on the venture side and all the way to the secondary market end of the ecosystem, and the record in 2010—in May of 2010 the FCC initiated its Title II proceeding which then was shelved by Chairman Genachowski for the other open Internet order of 2010.

But during the course of that, during the comment period, the record was filled by investors and market analysts of all stripes and flavors—small businesses, large businesses—indicating that Title II and rate regulation in particular would squelch investment.

What the exact number is is hard to tell and also, we don't have rate regulation yet but this can be a slow grinding halt. It is not like one day it just falls off of a cliff. But the reduction in investment over time can slow down considerably.

So you see just a slow decay or sort of a hardening of the arteries, if you will, in the lightning-fast Internet space and that would be a shame.

So it is potentially, in the tens of billions of dollars. But every analyst I talk to every week asks me about what the future potential rate regulation is on broadband and they are very concerned about it.

Mrs. BLACKBURN. Well, conversely, then let us look at if you provide certainty to the space and the FCC is prohibited from moving forward with rate regulation, what do you think the increase would be? Is it exponential? Is it unlimited?

Mr. MCDOWELL. Again, let history be our guide. If you look at the investment, the hundreds of billions in infrastructure investment since just the mid-90s I think you would see that sort of growth line continue.

I think without some sort of assurance or if there is actually the sword of Damocles hanging over—

Mrs. BLACKBURN. Yes.

Mr. MCDOWELL [continuing]. These investors, it will slow down.

Mrs. BLACKBURN. OK. Let me quickly go to the Small Business Deployment Act. I am concerned about that.

I know these temporary extensions are good but we need something that is going to make it permanent.

And I think of some of my smaller providers like Ritter Communications, which serves some of west Tennessee and is one of the small disclosures.

What can they expect if the exemption is not made permanent and how will these disclosure requirements affect their ability to serve some of these rural and underserved areas which are just clamoring they need access to broadband for economic development, for enhanced educational opportunities.

So tell me what Ritter and other small providers would expect.

Mr. MCDOWELL. Is that for Ms. Bowles?

Mrs. BLACKBURN. It is for you.

Mr. McDOWELL. Oh, for me. Certainly. And I think she is actually going to give you an even better answer.

But the notion that more regulation is going to help smaller providers deploy and serve customers in hard to reach areas sort of turns all the logic on its head, right.

So I will let Ms. Bowles elaborate on that but—

Mrs. BLACKBURN. OK. That is good. Go ahead. Go ahead.

Ms. BOWLES. Yes. Right now, companies like Ritter and like Aristotle are moving into rural areas and deploying and bringing much-needed service into the very areas that you are talking about and regulation will slow that down.

It isn't going to augment that in any way. Even taking some of the numbers that Congresswoman Eshoo put out there and saying that they are accurate, 24 hours is a lot of time in a company. Like, there is one in Colorado run by Eaton Rakour and he is the only employee of that company.

He recently hired a second employee. It is his daughter. That man doesn't have 24 hours. If a tower goes down, he has to go out there. He doesn't have 24 hours in a year to be dealing with this regulation, and that is assuming it can all be done in-house.

We don't mind dealing with customer complaints. We don't want to pay attorneys to have to deal with this regulation. That takes away from our ability to deploy into the same rural areas that we all agree are in desperate need of this service.

We are in Arkansas. You don't have to go very far outside of Little Rock and they have, literally, nothing. And this regulation and the fact that I have to be concerned about spending 80 hours a year on an attorney even that is expensive for a business of my size.

We are not talking about businesses with hundreds of millions of dollars in revenue. We are talking about very small businesses with one employee and under a thousand customers.

Mrs. BLACKBURN. OK. Yield back.

Mr. WALDEN. The gentlelady yields back.

The chair recognizes the gentleman from Pennsylvania, Mr. Doyle.

Mr. DOYLE. Thank you, Mr. Chairman.

Welcome to our panelists and, Commissioner McDowell, it is good to see you again.

Mr. Feld, I have been fighting for a long time for reforms to the competitive market for business-to-business high capacity data lines, or what we call special access.

This market is ripe with allegations of price gouging, predatory terms and conditions and anti-competitive behavior by incumbent telecommunications companies and I am glad to see the FCC acting to make the much needed reforms to these markets.

Tell me, what effect do you think the rate regulation bill before us will have on the FCC's ability to complete its special access proceedings?

Mr. FELD. Well, as written I believe it will bring everything to a crashing halt.

It is important to recognize that a legal argument does not have to ultimately prevail to prevent the FCC from moving forward on important competitive policies and consumer protections.

Some years back, we were involved in the bill shock proceeding where, as members know, they were receiving letters from constituents that their folks were receiving bills for \$5,000 because their phone got turned on in Canada.

And when the FCC went to take action they ran into the concern about their authority, that what is called the common carrier prohibition would prevent them from applying basic consumer protections.

A requirement to send an alert that you are about to generate an overcharge would be preempted by the common carrier prohibition because broadband at that time was a Title I service.

It is very easy to see how in the special access proceeding, which has been going on for more than 10 years, where the GAO has twice reported that the FCC needs to take action and where we are, finally, after a mound of evidence has been collected, a framework established, we are on the verge of being able to put this thing to bed and get it done and stop monopoly pricing, now, a new broadly-worded sweeping law will be introduced which will bring everything to a halt and may force the process to be discontinued altogether.

Mr. DOYLE. A number of ISPs have announced plans to institute zero rating policies. These plans allow ISPs to designate certain types of Internet traffic as not counting against a consumer's data cap.

I am very concerned that some of these plans involve ISPs zero rating their own services, particularly video services that compete against over-the-top services like Netflix, Amazon Prime, iTunes, forcing consumers to use their own data with a competing service while zero rating their own services.

It seems blatantly anti-competitive to me. And additionally, there is reports that ISPs are establishing paid zero rating agreements where edge providers have to pay the ISP to get their data zero rated.

Most worrisome is reports that companies are using the guise of zero rating to throttle entire classes of content without even notifying their customers.

Aggressive zero rating policies paired with restrictive data caps threaten the very core of the open Internet in the dynamic ecosystem of the competitive services we have all come to enjoy.

What effect do you think this rate regulation bill before us will have on the FCC's ability to police this type of behavior?

Mr. FELD. Well, I am very concerned about that. It would seem that—as Commissioner McDowell said, he would like to actually have this clarified to make sure that it would absolutely prevent the FCC from going after even basic fraud.

There are 12,000 complaints at the FCC already about Comcast having inaccurate broadband data meters. So that even if we accept that it is OK for them to not count their own product stream as opposed to counting everybody else's streaming product like Amazon or Netflix, even if we were to accept data as OK and not anti-competitive, which raises particular concerns, we have thousands of customers complaining that the broadband meters that they use are inaccurate, that Comcast does not adequately explain the charges of where they come from.

And I think everyone on this committee has read the joys of trying to work your way through the Comcast complaint system to have these charges explained and potentially reversed.

It is, even from a basic consumer protection standpoint, very troubling to have such a sweeping, broadly-worded law injected into this process, and when we look at defending the core net neutrality principles, which everybody has said there is broad consensus on from many Republicans as well as from Democrats, I would say that Ms. Matsui is absolutely correct, that it becomes effectively impossible for the FCC to enforce its core net neutrality principles, which are exceedingly popular and on which there is widespread consensus, because any of them can be interpreted as either directly or indirectly regulating the rate by—at which broadband services are offered.

Mr. DOYLE. Mr. Chairman, thank you.

Mr. WALDEN. You are more than welcome.

And we will now turn to the vice chair of the subcommittee, the very capable Mr. Latta.

Mr. LATTA. Well, thank you, Mr. Chairman.

Mr. WALDEN. I can be more complimentary now that Ohio and Oregon aren't playing the national championship.

Mr. LATTA. That is right. But, again, thanks for holding today's hearing. Again, thanks for our panel for very good testimony today.

Ms. Bowles, if I could start with you. I would like to kind of combine a couple questions right off the bat because I think that we all have—a lot of our districts look very similar to one another.

And last year I was contacted by a company in my district called Amplex, which serves about 5,500 customers, and they made me aware of their concerns about losing the exemption to enhanced transparency rules for small providers because if the exemption were to expire they would incur additional legal costs, which you have been really explaining here in what it would do in network and monitoring costs that they simply could not afford.

In your testimony you also recognized how making the transparency exemption for small ISPs permanent keeps resources where they should be—expanding the company, hiring more employees, upgrading the network and providing better service to rural and underserved Americans.

Two questions, and I am going to also have you maybe back up to what the gentlelady—the ranking member—had asked to Mr. McDowell.

First, why do you think the FCC ignored hundreds of comments and letters to make the exemption permanent and only extended it by one year? And if you would also like to elaborate a little bit on the ranking member's question to Mr. McDowell.

Ms. BOWLES. I think that the FCC has some discomfort and, obviously, I am not in their mind and so I don't know what their thinking is. The record was extremely one-sided.

There is not anything in the record that indicates that small businesses are the bad actors. There is not a single idea in the record that the small businesses are the ones that are engaging in these predatory practices.

Companies like mine don't have the market power to influence in the way of a company like Comcast. And so I believe that the FCC hasn't done its homework.

I go back to what Commissioner McDowell said. It didn't do its homework. It got its cart before the horse. I think that is a very good way of putting it.

It wanted to get this out there as quickly as it could and it, essentially, punted on the issue of the small business exemption.

Mr. LATTI. Why would they want to get it out there that quickly then?

Ms. BOWLES. Hmm?

Mr. LATTI. If they didn't do their homework, why do you think they wanted to get it out there so quickly?

Ms. BOWLES. I think they wanted to get the open Internet order out, and when we had our meetings with the FCC prior to that order and we were saying you have not looked under the Paperwork Reduction Act, you haven't looked at the impact on small businesses, I think they realized that they hadn't.

And so they put in the exemption so that they could get the order out and, like, punt that down the road and deal with it later. And then at the very last minute on the last day when that order was set to expire, they punted it for another year.

I think they are trying to figure out a way—I don't know what they are trying to get to. I don't know whether they are trying to find a compromise.

I don't know if they don't like the 100,000 number that they were using and if they should be using the SBA definition. I don't know where they are coming from on that front.

But I do know that there was no justification in the record for making the exemption temporary. The exemption should have been made permanent. It should have been made permanent in December.

There was absolutely nothing to support a temporary let us extend this again and create more regulatory uncertainty for another year, and that is really the problem. The problem is we don't know what to expect.

Nobody knows what the regulation is going to be at the end of the day and it is very difficult to assess how we are supposed to respond to something when we don't actually know what is going to come out at the very end.

We live in these communities. We work in these communities. We support these communities and we want to bring broadband into the communities in which we live. We are very, very small businesses and I can't emphasize that enough.

Even \$10,000—I know the owner of Amplex and he has a very robust business but it is small by any measure. By any definition his business is small, and having to come up with even \$10,000, \$15,000 for regulatory counsel is a huge amount of money for a company of that size.

So I don't feel that it is an exaggeration to say that it is impacting our businesses very severely even to get the legal advice necessary to understand what we are supposed to do to deal with this.

And we would like certainty. We encourage Congress to act to give us that certainty and I think that the appropriate thing in

light of the record, in light of the fact that we are not the bad actors, that is to make this exemption permanent.

Mr. LATTI. Thank you.

Mr. Feld, if I could ask in my remaining 30 seconds here, and you testified about the rural broadband subscribers who are in need of protection from fraud or fly-by-night providers.

Could you describe some of the business models of a fly-by-night rural broadband provider?

Mr. FELD. Certainly, and I need to emphasize that we have a long history that wherever we establish a permanent exemption exempting an entire class of businesses bad actors move in.

And as a consequence, it is not a question of the providers that we are—that we have today in the market that troubles me.

I have worked with WISPA and with Ms. Bowles on a number of spectrum issues and I am, in fact, very supportive of their efforts to bring broadband to rural America and I am happy to testify to that when we have a spectrum hearing.

But I do worry that once we put out a sign out there that says this is a great place to go if you want to set up a scam operation because you can't be held accountable that people will take advantage of that.

In particular, I worry about a failure to disclose about network management practices where extra charges would be put in. If I were a bad actor looking to scam small businesses, I would offer them great introductory rates. I would offer an—

Mr. LATTI. Yes. We are running out—if I could just ask real quickly, could you point us to one of those actors, like, an example?

Mr. FELD. As in an example in the real world today?

Mr. LATTI. Right. One of those type of nefarious type operators.

Mr. FELD. I am sorry. I am not sure that I understand the question. Specifically with regard to the FCC's transparency rules?

Mr. LATTI. Do you have the evidence to those type of operators and can point us to one of those type of operators?

Mr. FELD. Well, the FCC continues to receive complaints on a regular basis. Most of them, it is true, concern the larger operators, which is not surprising because they have the larger number of customers. With regard to small businesses, I am happy to—

Mr. LATTI. If I could ask you to follow up to the committee with some written examples, we would appreciate that.

Mr. FELD. Certainly.

Mr. WALDEN. We now need to turn to the gentlelady from New York, Ms. Clarke.

Ms. CLARKE. Thank you very much, Mr. Chairman, and I thank our ranking member for holding this hearing. To the panelists, thank you for lending your expertise to the examination of today's legislation.

Mr. Feld, the transparency rule has been an important staple of the FCC's net neutrality rules for some time. As they say, knowledge is power.

Could you briefly explain what the transparency rule and its enhancements seek to accomplish and why it may be so important?

Mr. FELD. Certainly. The transparency rule, and there has been broad bipartisan consensus about the value of transparency, seeks to provide to subscribers a clear understanding of how the provider

will manage the network—what the capacities of the network is—from a business perspective, whether the network is actually up to the task that you need to hire it for.

This encourages market competition, protects consumers, businesses and innovators. We have a broad policy in this country of encouraging telecommuting, of increasing traffic to broadband and if I am a small business operator—an architect, for example, that uses very heavy data-intensive files, gigabits of data which is not necessarily the same as the needs of another small business, I need to know if the broadband provider I am choosing can handle the kind of business that I am running.

I am a private subscriber but I spend a lot of time doing high bandwidth things—following hearings in Congress, for example, but also talking to my mother in Boston with Parkinson’s—and those sorts of things take a lot of bandwidth.

I need to know when I am choosing, since I am lucky enough to be in an area with choice, which providers are going to impose limits on things like my video calls and my streaming and how they will manage these things when there is congestion.

Ms. CLARKE. And I understand there is a difference between the small business definition that the FCC uses for transparency exemption compared with the definition in the discussion draft.

Can you briefly explain the difference and the impact it has?

Mr. FELD. Certainly. One of the things that is important to recognize is the SBA, and for many years the FCC and other agencies that deal with specific industries, do not employ a single definition for what constitutes a small business.

SBA and the FCC have always looked to the particular sectors of the telecommunications market. So a small business from a television perspective means something different from a small business, from a cable perspective, from a wireless provider and so on, including broadband providers.

We have, in the broadband industry, a huge disparity between the large cable providers and the large telephone providers and wireless companies, which have millions of customers and where they are able to achieve economies of scale, and very small providers who do not have the economies of scale, who have different costs and expenses for whom relief may be appropriate.

So the FCC, in using its general definition, crafts a definition and SBA similarly crafts a definition suitable to the broadband industry specifically.

In this case, we are talking about an expansion of, I am given to understand, about 85 percent over and above the current SBC exception.

These are businesses that have been subject to the transparency requirements for six months and there is no evidence that these businesses are suffering any of the concerns that Ms. Bowles has suggested afflict smaller companies.

And as a consequence, we would look at doubling the number of Americans who lose the benefits of transparency and include companies that, by the standard definitions in the industry, would be considered to be mid-size carriers rather than small carriers.

Ms. CLARKE. Thank you.

Ms. Bowles, in your testimony you noted several times the enhancements to the transparency rule would place an inordinate burden on your members.

Could you explain precisely what this burden would be for your members?

Ms. BOWLES. The enhanced transparency requires additional disclosures which have to meet certain standards that have been set by the FCC.

Those standards are vague. It is not clear what it is exactly that we are supposed to be doing and a lot of the FCC's determinations are going to be made sort of after the fact or through litigation and in the courts.

This is more of a direct regulation but what determines reasonable rates is not defined.

What includes sufficient transparency or adequate transparency? That has all got to be litigated through the courts or done through rural rate making through the FCC. We don't really know.

So we are taking our best guess at what we are supposed to be doing, and we may do our absolute best effort to find out 6 months later that it wasn't what the FCC had in mind or it isn't sufficient.

We may end up in litigation. We are subject to frivolous complaints, potentially, from customers who feel that they haven't been disclosed properly and we don't have enough guidance to know what it is that we are supposed to be doing.

So we are looking to regulatory counsel to give us that guidance but they don't know either because the guidance is not coming out of the FCC and it is not coming out of anywhere else.

And so until this is settled and we understand what it is, we have to have some better guidance, and just to speak personally from my business, we do believe in an open Internet. We do disclose our policies to our customers.

I have no idea whether that disclosure is sufficient under these enhanced disclosure requirements and I have no way to find that out other than to hire an attorney to give me an opinion as to whether our disclosures are sufficient, and it is expensive.

Mr. WALDEN. The gentlelady's time has expired.

We will turn to the gentleman from New Jersey, Mr. Lance.

Mr. LANCE. Thank you, Mr. Chairman.

I have from the CTIA, the wireless association, fine information regarding the blocking of robocalls perhaps that might be utilized and I ask unanimous consent to place that information in the record.

Mr. WALDEN. Without objection.

Mr. LANCE. Thank you, Mr. Chairman.

Commissioner McDowell, you say that the order does not proscribe ex post facto rate regulations. Could you describe an example in which the FCC might engage in an ex post facto rate regulation and what would it look like?

Mr. McDOWELL. So, hypothetically, what we are talking about there is if whether it is the interconnection points or for end users or whatever. It could be at any point in the network.

Someone brings a complaint to the FCC. They say look, they are giving us access or whatever but we think the rate is too high. And

the commission will say look, we are not going to engage in rate regulation but you are right, that rate is too high.

So through an enforcement proceeding it would be essentially a rule making and that is essentially the implementation of what we call a price cap regime. This is not rate of return. It is sort of a de facto price cap.

So that then creates more uncertainty in the market—well, what is too high, what is just right, what is the Goldilocks price here?

Mr. LANCE. Thank you. And any response to the claim that the bill prohibiting rate regulation could result in prolonged litigation uncertainty, from my perspective, doesn't current ambiguity and overly broad rules also lead to the fact that there might be litigation?

Mr. McDOWELL. Sure. I mean, it is important to note that just Sections 201 and 202 of the 1934 Act have been litigated about 400 times in the appellate courts and over 1,000 times within the FCC administrative regulation. And that is just two sections of Title II, both of which, by the way, deal with rate regulation.

So I think we can expect that in the future, should there be rate regulation, even if it is sort of this de facto ex post type regulation.

Mr. LANCE. Thank you. Would anybody else on the panel like to comment? Mr. Feld, yes.

Mr. FELD. Thank you. I do wish to express a couple of points.

One is what concerns me is when Congress took this approach in 1984 with regard to cable and in the 1984 Cable Act preempted all forms of rate regulation including the kinds described by Commissioner McDowell, it turned out to be a disaster.

The price of basic cable service escalated. Cable operators were quick to take advantage of their incumbency and engage in broad anti-competitive action.

By contrast, the Title II Section 201, which is what we are talking about here, is the period where Commissioner McDowell agrees that investment telecommunications under the 1996 act flourished.

Those are the conditions under which the wireless industry flourished, and when those industries have begun to consolidate and begin to overcharge consumers it is the ability of the FCC to come in and act, which has helped to restrain them.

If the prices are generally monopoly rate prices and therefore people come to the FCC saying they are too high, I would hope that the FCC would act to constrain genuine monopoly rate prices.

I think that, additionally, as Commissioner McDowell noted earlier, this is not going to happen overnight in terms of impacts. When we are talking about these things potentially if there are problems it will be a gradual process that emerges.

I think the Congress will benefit enormously from seeing how this develops, allowing the FCC to resolve the existing uncertainty rather than perpetuating uncertainty by passing laws before we know what the final effect will be.

Mr. LANCE. Mr. McDowell.

Mr. McDOWELL. Thank you very much.

So a couple things. First of all, cable rates are not regulated. So the notion that they have been or should be is incorrect.

By the way, also information services, which is what we called these things until last year—broadband internet access—had no

transparency requirement before the 2010 open Internet order, right.

So as Ms. Bowles has pointed out, the record before the FCC does not contain really even a scintilla of evidence that certainly WISPs or smaller Internet services providers are engaging in fraud and deceptive practices and all the rest.

And, by the way, one of the problems with the Title II classification is that it took away jurisdiction from the Federal Trade Commission under Section V of the Federal Trade Commission Act to protect consumers.

That was the cop on the beat that people say is needed. They took a cop off of the beat and sent it to a different agency which doesn't have the same expertise as the Federal Trade Commission does.

So we haven't had information services rate regulated, cable has not been rate regulated forever, and so the notion that somehow there was this utopia where there was command and control rate regulation and everything was fine is just not true in this space.

The Internet has flourished precisely because it migrated further away from government involvement.

Mr. LANCE. Thank you. My time has expired. Thank you, Mr. Chairman.

Mr. WALDEN. Let us see. Next up the gentlelady from Colorado, Ms. DeGette.

Ms. DEGETTE. Thank you, Mr. Chairman.

I want to thank the panelists for coming today. I am sorry I was late but I actually had my own bill out for hearing in another subcommittee.

I did want to ask—as the FCC's net neutrality order continues to be implemented, one of the concerns that we heard is that there is regulatory uncertainty costs to potential Title II regulation and so I wanted to talk about that a little bit.

First of all, Mr. Feld, H.R. 2666 seeks to bar rate regulation under the net neutrality order and I am wondering without clearly defining regulating the rates would this bill create more or less uncertainty for telecom companies and, being a lawyer, I always ask this question—would it result in additional litigation?

Mr. FELD. Well, I think that it definitely, when you have broad-sweeping language with undefined terms but where the breadth of the language indicates a congressional intent to prevent even basic consumer protection such as protection against monopoly rates, this is going to create enormous uncertainty.

There is a conflict here in that there is a claim that we are not going after the core Title II protections. We are not going after the core bright line rules that the FCC established.

We are only going after rate regulation. But without defining this we have essentially said yes, but anything you do to actually enforce the rules you have could be considered rate regulation and that is just going to encourage an enormous amount of uncertainty and litigation.

I also must respond just a little bit to Commissioner McDowell in saying the sweet spot we have now is exactly the one. It is not command and control tariffing, which everybody agrees is bad.

It is not the Wild West, where a handful of companies in a concentrated industry decide what the prices are to be on critical infrastructure. It is the current sweet spot of just don't rip off consumers and keep things reasonable, OK?

Can we just make an honest profit and not a monopoly profit? And I think the FCC ought to remain in a position to make sure that broadband companies make healthy returns but have to work for a living and satisfy consumer demands to do so.

Ms. DEGETTE. What do you think about that, Commissioner McDowell? Obviously, you have a few.

Mr. MCDOWELL. There is a lot there so which are you referring to?

Ms. DEGETTE. Well, in particular, the definition of regulating the rates. Do you think that is going to lead to more litigation since—

Mr. MCDOWELL. Well, regulation is going to lead to more litigation, absolutely, even if it is—

Ms. DEGETTE. But the fact that it is not so clearly defined in the legislation.

Mr. MCDOWELL. Well, I sort of offered a couple of ideas—general categories of ideas as to how you could define it, I think, better.

You know, in terms of consumer protection I think there could be probably friendly amendments offered to where you could find consensus on that. I don't think—

Ms. DEGETTE. So you share my concern that that term might be over broad in the legislation?

Mr. MCDOWELL. Well, my testimony speaks for itself.

Ms. DEGETTE. Yes or no will work.

Mr. MCDOWELL. Yes, there could be some clarity involved there.

Ms. DEGETTE. Thanks. OK. I think it would be really great if you could work with us on helping to clarify that if you have some ideas—

Mr. MCDOWELL. Be happy to. Happy to work with you.

Ms. DEGETTE [continuing]. We would love to hear it.

Mr. MCDOWELL. OK.

Ms. DEGETTE. Now, it is my understanding that the FCC forbore itself from the portions of Title II that it would need an order to set the rates of Internet service providers.

So I am wondering, Commissioner, what would be required for a future FCC commissioner to set the rates for ISPs.

Mr. MCDOWELL. To prohibit a future FCC from doing that?

Ms. DEGETTE. Right.

Mr. MCDOWELL. Yes. So I think the seeds for that are definitely in the legislation before you today so to help prevent that from happening. And, again, this could be the bipartisan consensus from President Obama on down.

Ms. DEGETTE. So you really think that we could work to really hammer out this legislation for more clarity?

Mr. MCDOWELL. I am very optimistic, absolutely.

Ms. DEGETTE. OK. But you think it—

Mr. MCDOWELL. It would be an honor for me to work with you.

Ms. DEGETTE [continuing]. You think it needs some work?

Mr. MCDOWELL. Absolutely, as I said in my written testimony.

Ms. DEGETTE. OK. Great. Thanks. I yield back.

Mr. WALDEN. The gentlelady yields back. The chair recognizes the gentleman from Kentucky, Mr. Guthrie.

Mr. GUTHRIE. Thank you, Mr. Chairman, and thank you all for being here.

And Mr. Feld, I want to ask you a question. You argue that there is no need to grant an exemption for small businesses for the enhanced transparency rules.

But in my opinion, the record does not support your contention. The record actually indicates that the burdens imposed by the enhanced transparency rules could require hundreds of hours of compliance work by small ISPs like Ms. Bowles' who can ill afford to spend that money on anything that does not improve underlying ISP service.

There are very few arguments that the rules are necessary for small businesses. One argument that you make is that the transparency requirements are necessary to catch the "fly-by-night actors and scammers."

But isn't that more like using a sledgehammer to swat a fly? And the question I had, really, is why should all small business operators be saddled with onerous and costly transparency requirements so that we can catch a few bad actors?

Mr. FELD. I am sorry if I am unclear.

What I believe I said, and what I certainly mean, is not that we should not have a set of rules that are sensitive to the needs of small carriers.

I am not even opposed to the FCC deciding that at this time we could make the exemption permanent. What I worry about is Congress' preemptive effect, and when Congress passes a law, as Ranking Member Eshoo said, that is a big deal because it makes it impossible for the agency to respond to changing circumstances.

As we move forward and things settle we may need to revisit this. We may find that we see the emergence of scams.

That has been, as I have said, a long history that wherever we have set up a permanent congressional exemption to oversight or accountability that bad actors move in because they can.

So, again, I am not against a permanent exemption on a complete record. I simply believe the moment now is premature. The FCC is in the process of evaluating the record and I believe their process is correct.

I know there has been some suggestion that the cart was before the horse. But I would suggest that the FCC determined that the enhanced transparency was in the public interest. That is self-evident.

Mr. GUTHRIE. Thanks. I appreciate you clarifying that, but it gets to the fundamental question, and I think throughout this city and throughout this history written about this era in government is I think Congress has in the past—I think some of this is Congress' own fault.

They have been very deferential to the administration and not just here. Everything that we are talking about here. Well, I was just in a meeting beforehand in the labor area, and in doing so it allows the vagueness.

It is too hard to get things changed, let us make it open, let us make it where the administration can administer—why should

Congress put something that is too hard to get it undone if it needs to be undone?

And I would argue in EPA, and not just labor meeting, whatever, then what happens if the administration doesn't do the intent of Congress. And I would certainly say that I think it is our responsibility to clarify.

So I appreciate your position. I think it is our responsibility to make sure if it is something we think is in the good interest that it is congressionally enforced and mandated.

And, Ms. Bowles, you said the FCC—earlier the FCC punted on making the small business exemption permanent? Do you think they fell back when they should have?

Ms. BOWLES. That they failed to make it permanent when they should have? Yes.

Mr. GUTHRIE. You think that it would be—so the question also that I hear, and it is not just in this world but it is in the entire government world, everywhere I go—and you are a small business person—in my district my family has a small business, a medium-sized business, so everywhere I go it is not just what the rules and regulations are.

It is just that people don't know what they are going to be from day to day or month to month. I had a bill out of this full committee in another subcommittee on the health care bill for small businesses and even the witness against the bill said exactly what was just said is that I believe we should do this but let us not make it permanent—let us do a waiver for a year to see if this works or not work.

And that is what I said—throughout government and people trying to implement business, grow business and hire people to put them to work or just—there is so much uncertainty.

That is a common word I hear if you go into a restaurant, a manufacturing business or in a high-tech business, such that you are in.

So what does the uncertainty of these reporting requirements prevent you or help you? I'll let you say—I'm not going to prejudice the question—how does it help or hurt you in what you want to do as a business person?

Ms. BOWLES. Well, I want to reiterate that all members are small. The average WISP has 1,500 to 2,000 customers. They are small businesses with very few employees, usually less than a handful of employees that are doing this.

They live in the communities they serve. They are working next to their neighbors. They live in the real world and they are dealing with real world problems.

And so what the regulatory uncertainty does is it distracts them from dealing with the real world that they are in and getting broadband service to their neighbors with this thing that is not necessary, based on the record, that causes them to turn their attention away from expanding their networks and getting broadband into rural America.

Rural America can least afford additional regulatory expense and that is what essentially is happening. The 3,000 small ISPs are serving the areas in this country that the larger providers cannot financially justify going into.

We are able to do it because the barriers to entry are so low because the cost for our members coming in to serve it are low enough that we can justify it. If those costs go up, then that justification changes. Their community—

Mr. GUTHRIE. Thanks. I understand my time has expired. Appreciate the answer. Mr. Feld, I appreciate you for clarifying as well. Thank you. I yield back.

Mr. COLLINS. Mr. McNerney, 5 minutes.

Mr. MCNERNEY. I thank the chairman. I thank the witnesses this morning.

Ms. Bowles, looking at the Small Business Broadband Deployment Act, one of the contentious issues is how to define a small business.

If you look at the earlier definition of 100,000 subscribers, that sounds like a lot to me. I mean, if each subscriber is \$100 a month and you have 100,000 subscribers that's \$10 million a month, \$120 million a year.

That is not a small business, in my mind. So what would be—how could you define a small business? What would be the measure of a small business, in your mind?

Ms. BOWLES. Honestly, I have to defer to the experts in the United States government who define that. I understand that there are a lot of different definitions for small business and the 100,000 number or the SBA's use of a 500,000 subscriber number.

As I said, the majority of our members are significantly smaller than that.

Mr. MCNERNEY. Right.

Ms. BOWLES. That would fit under any definition of small business. So from our perspective, the important thing is whatever number you end up with it needs to embrace the smallest of the small businesses so that they are protected so that they can continue to grow their business and continue to serve rural America.

Mr. MCNERNEY. So, is the number of subscribers a good metric to define small business—

Ms. BOWLES. It is an adequate metric. It is a proxy for revenue. So I suppose it is fine.

But number of employees is also significant because if you have only five employees, even if you have 10,000 subscribers it would be a very substantial burden for a company of that size.

So I think you need to look both at how many employees you have as well as your revenue or the number of subscribers that you have. I don't think it is a singular number necessarily.

Mr. MCNERNEY. Commissioner McDowell, would you want to weigh on this? How would you—

Mr. MCDOWELL. I think it is a healthy discussion to have exactly how you are defining small business—is it on a subscriber basis, an employee basis, revenue basis, although employees and subscribers, I think, capture a lot.

I think the point that Ms. Bowles is making is that the vast majority, in fact, if not 99.99 percent of WISPA's members are mom and pop organizations, quite literally, or dad and daughter, as you pointed out, organizations. And so—

Mr. MCNERNEY. So, 100,000 subscribers seems like a modest—

Mr. MCDOWELL. If you are at a WISP and you have 100,000 subscribers, roughly, how many employees would you have?

Ms. BOWLES. Oh, wow. You would have to have several hundred employees to have 100,000 subscribers. You have to have several hundred employees.

Mr. MCDOWELL. But that could still fit within a small business definition?

Ms. BOWLES. That could still fit within a small business and it is correct, 99.98 percent of our members fit underneath the small business definition provided by the FCC.

Mr. MCNERNEY. I mean, it sounds like moving from 100,000 to 500,000 subscribers is a bit of an overreach.

Mr. Feld, my next question has to do with the Universal Service Fund. I think in your testimony you indicated that the 2666 might impede that development. What is your feeling on that?

Mr. FELD. I have a lot of concerns. The USF reform has been very complicated. Part of it is based on a core provision of the statute, Section 254, which directs that services should not cost substantially more in rural areas than comparable services in urban areas.

So if the core purpose of the statute, particularly for the rural high cost fund, is to regulate rates and make them more affordable for people and you have a law that says absolutely no—under any law can you do anything that regulates rates, then I don't see how you avoid the problem of well, the purpose of the whole law is to make the broadband affordable. That is rate regulation—indirectly through a subsidy, but still rate regulation.

The additional problems are that one of the goals in high cost in particular has been to end the system of implicit subsidies, inter-carrier compensation and termination fees and shift to a more straightforward explicit compensation through the high cost fund.

That was in order to balance these things out without raising the rate on the ratepayers done by price regulation. So and that was challenged and affirmed in the Tenth Circuit.

But this would give those folks who lost a fairly lengthy and contentious litigation a second bite at the apple, and I don't see how the FCC doesn't just throw up its hands and put everything on hold or abandon the operation altogether.

Mr. MCNERNEY. OK. I am going to let the commissioner answer but please keep it brief.

Mr. MCDOWELL. Yes. I am sorry. I know we are short on time.

First of all, I think it will give both of you some comfort that in October 2011, three Democrats and one Republican, we got together for the first time in history and incorporated some reforms for the universal service to extend those subsidies to broadband services when they were deemed an information service prior to the Title II order of last year.

So it was the unanimous consensus of the commissioners and of the staff at the FCC that you did not have to have broadband classified as common carriage and therefore subject to rate regulation, which is where I am going with that.

So that is number one, and that was litigated before the Tenth Circuit and upheld. So that was challenged and upheld by the courts. So I don't think there is going to be an issue here at all.

But if there is an issue, then the other comfort I would like to offer is that perhaps there could be a friendly amendment to that regard saying universal service is a carve out.

Mr. MCNERNEY. OK. Thank you for the suggestion.

I yield back.

Mr. COLLINS. The chair recognizes Mr. Kinzinger.

Mr. KINZINGER. Thank you, Chairman, and thanks to the folks here and thank you for holding this hearing to the committee.

I want to just talk about a couple of bills I introduced: 2666 and 1301. The Amateur Parity Radio Act has over a hundred bipartisan co-sponsors including the chairman, and as a point of interest every member of Congress throughout the country has at least a few hundred licensed amateur radio operators in their district.

Under current law and regulation in certain areas, ham radios are outright prohibited from placing any form of antenna on their home, even those as small as a four millimeter diameter wire that would run under an awning or flat against a house.

For some, this is merely a nuisance but for others—those that go through additional training and certification to become an emergency communications volunteer—this can be dangerous.

During times of emergency, like a hurricane or a tornado, amateur radio operators are able to use their skills and equipment to create a network of communications for first responders when all other networks have failed.

And as a point of interest, as a military pilot, there were a number of times overseas where we would actually use phone patches and passcoded messages through ham radio operators to our command post, and so I think that is very interesting to note that they serve that purpose, too.

And a quick summary from the FEMA director, Mr. Fugate, on the issue he said, “I think that there is a tendency to believe that we have done so much to build infrastructure and resiliency in all of our other systems. When everything else fails, amateur radio oftentimes is our last line of defense. When you need amateur radio, you really need them.” And I think this is very important.

H.R. 1301 would change some of these issues by implementing a reasonable accommodation standard. There is no mandate on the placement size aesthetics, as those decisions are left to the discussion to take place between ham radio operators and their jurisdictions.

We would just simply add the same standard that has been used successfully in municipal areas to other areas.

Switching gears, the rate regulation bill comes about as a result of comments and statements made by the president and by Chairman Wheeler.

Following those statements, Chairman Wheeler and I had a conversation in this subcommittee where I asked him the question of would you support legislation that simply said notwithstanding any provision of law the Federal Communications Commission may not regulate the rates charged for broadband Internet access service—very simple. And the chairman agreed and so we have this bill before us today.

Simply put, the government should not be in the business of regulating the rates of private industry and that is a lesson that we

learn when we look at failed governments of the 1980s in the past in terms of regulating private industry.

Chairman Wheeler has stated that he will not go down the path of rate regulation and I give him credit for that, rightfully so. But the power is still there for any future chairman.

In listening to the debate today, some legitimate concerns have been raised and I would offer that if it takes some small changes to address those concerns I am more than happy to sit down with any interested parties.

We want to do this in a bipartisan way. But I think it is important that we have this conversation and I appreciate you being here.

Mr. McDowell, you bring up the risk of not only this FCC regulating broadband access rates but a future commission as well, and I know you have served under different administrations.

Can you elaborate how that is a concern for you?

Mr. MCDOWELL. Absolutely. Statutory interpretations can change based on the political philosophy and ideology of whoever is chair and who constitutes a majority of the commission.

So 8 years ago, for instance, Section 706 was never contemplated as giving the FCC some sort of secret expansive power over the Internet space. But that came out of the 2010 order and then it was blessed by two judges on the D.C. circuit.

So that changed dramatically, just the interpretation of Section 706, which, at the time of the 1996 act, was considered deregulatory, not more regulatory.

So you want to make sure that what the interpretation by an FCC is today remains the same. You want to codify that, enshrine that in the statute. That is the only way to really have certainty for the long run.

Mr. KINZINGER. Yes, and I know we are involved in this committee in terms of process reform for the FCC, which I think is necessary in opening up a lot of the process.

But I think what is important to note is that big decisions like this, without this codified, can be made by a few people—a few people that make the decision at the moment, and it is the jurisdiction of this committee and this Congress to regulate things like interstate commerce.

And when we say we don't want broadband regulated by the government, I think we have a rightful position to have that debate, have that argument and to get this done.

And, frankly, again, I would just reiterate my position is very bipartisan because the chairman of the FCC agreed with me. The president agrees with me. So at this moment of bipartisanship in this committee we may as well codify that into law.

So with that, I want to say thank you to you all and I yield back.

Mr. COLLINS. I thank the gentleman for his questions. The chair recognizes Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman, and thank the panel for being with us today.

Ms. Bowles, can you point to any specific flaws in the FCC's analysis when the agency attempted to determine how much the enhanced transparency requirements would cost small businesses?

How did the agency fail to account for the specific needs of small businesses? Can you comment on that?

Ms. BOWLES. Yes. The FCC drew its conclusion from having made an assumption that because the business is smaller the regulatory burden would be smaller and that is almost exactly backwards from the reality.

A smaller business doesn't have the armies of lawyers. It doesn't have the teams that are already meeting regulatory burdens that many of the people who are affected by open Internet already have in place.

So the small ISPs weren't in the record and there wasn't an analysis done of the actual cost, the actual monetary costs or the impact on the networks or the impacts on expansion.

And I have said this before but we have very, very small WISPs for whom this could literally put out of business. They have one employee.

So it is very hard to—I don't think the FCC really did any analysis of that side of the equation. They just came off—

Mr. JOHNSON. And it is your assessment that that impact on small business would be significant?

Ms. BOWLES. Yes.

Mr. JOHNSON. OK. Mr. Feld's testimony discusses significant unintended consequences of the Small Business Broadband Deployment Act including customers turning instead to national providers.

As a representative of the small business community, would you like to respond to that?

Ms. BOWLES. I don't think that is a realistic concern.

Mr. JOHNSON. OK. And it is not—

Ms. BOWLES. We compete in an open marketplace right now with larger providers. My company serves rural communities but we also compete in Little Rock, Arkansas.

We compete directly with AT&T and Comcast and larger providers and we compete on service, we compete on locality and we compete on price.

Mr. JOHNSON. OK.

Ms. BOWLES. And in the rural communities we serve, these are our neighbors and our friends and we compete, again, on service and on price and it is a competitive marketplace. It doesn't concern us at all.

Mr. JOHNSON. OK. All right.

Finally, Ms. Bowles, was there overwhelming support for making the small business exemption permanent?

Ms. BOWLES. Yes. To my knowledge, there were no comments opposing until the very last moment and before the closing—

Mr. JOHNSON. Yes, I want to get into that.

Mr. Feld, based on the FCC's order, it appears that Public Knowledge did not file comments in response to the bureau's public notice on this issue.

In fact, it appears that the only party to disagree with the extension at all in the proceeding was Free Press doing so not in comments but in an ex parte submission made the Friday before the order was released. That is 97 days after the close of the comment period.

So is it correct that Public Knowledge did not file?

Mr. FELD. We believe the extension for the FCC to complete its work was justified.

Mr. JOHNSON. No, that is not the question I asked you.

Mr. FELD. You are correct. We did not file.

Mr. JOHNSON. You did not file?

Mr. FELD. That is correct.

Mr. JOHNSON. OK. I yield back. Thank you.

Mr. COLLINS. I thank the gentleman for his questions and as we bring this hearing to a conclusion, I will recognize myself for a couple of minutes here as we wind down.

So Mr. Feld, I am a little bit confused or concerned about Public Knowledge not being supportive of H.R. 2666, which is the no rate regulation.

So I want to make sure if we are on the same page here in saying I think, and hopefully you would agree, that the president was clear in saying that the FCC should forbear from rate regulation. You would agree with this, I am assuming?

Mr. FELD. Yes, from standard rate regulation.

Mr. COLLINS. And then we have Chairman Wheeler also saying time and again that he believes in forbearing no rate regulation, no filing tariffs. Again, I—

Mr. FELD. Having once upon a time and long ago done tariffing and rate regulation through that fashion, I would not wish it on anyone.

Mr. COLLINS. So with both the president and the chairman saying this, I am a little confused by why Public Knowledge wouldn't support H.R. 2666.

Mr. FELD. Well, as we have heard, there are a number of interpretations of what the broad sweeping language of H.R. 2666 would mean.

I certainly don't think of preventing monopoly providers from charging monopoly prices as being rate regulation.

On the other hand, we have heard views expressed that even that kind of ex ante enforcement of traditional consumer protection should be considered rate regulation under the statute.

So while I think that there is agreement on a very broad principle, nobody wants to go back to the old days when we were all quibbling about what went into the rate base and concerned about the ability to raise prices through rate regulation in the fashion that Commissioner McDowell described earlier.

I think that we do have a great deal of concern that where providers are charging fraudulent prices, billing in ways that are designed to confuse consumers—what I like to refer to as the nickel and diming of the American people, which it is the FCC's job to stop. I am greatly concerned that the statute as written, given its broad sweeping language, would have that effect.

Mr. COLLINS. Well, I can appreciate your interpretation, perhaps, but I would like to think forbearance is forbearance and the rate regulation piece was the key sticking point with a lot of Republicans on this and we were always uncomfortable with the president saying he would forbear on the rate side, as did Chairman Wheeler.

And since a year from now we will have both a new president and at some point probably a new chairman, I think at some point this Congress could codify where we stand on that.

So I want to thank the witnesses for their testimony and the ranking member has certainly indicated, I think, we have a context we can all work with here. That is what the hearing is all about.

Your input has been very valuable, and as we move forward in the next month or so into a markup we will take your testimony into account and I want to thank you for that and also encourage you for the members that ask for some follow up if you could provide that in a timely manner that would be appreciated.

So I would remind all members there are ten business days to submit questions for the record. I ask the witnesses to respond accordingly.

And without objection, the committee is adjourned.

[H.R. 2669 follows:]



114TH CONGRESS  
1ST SESSION

# H. R. 2669

To amend the Communications Act of 1934 to expand and clarify the prohibition on provision of inaccurate caller identification information, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

JUNE 4, 2015

Ms. MENG (for herself, Mr. BARTON, and Mr. LANCE) introduced the following bill; which was referred to the Committee on Energy and Commerce

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## A BILL

To amend the Communications Act of 1934 to expand and clarify the prohibition on provision of inaccurate caller identification information, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Anti-Spoofing Act of  
5 2015”.

6 **SEC. 2. EXPANDING AND CLARIFYING PROHIBITION ON IN-**  
7 **ACCURATE CALLER ID INFORMATION.**

8 (a) COMMUNICATIONS FROM OUTSIDE UNITED  
9 STATES.—Section 227(e)(1) of the Communications Act

1 of 1934 (47 U.S.C. 227(e)(1)) is amended by inserting  
2 “or any person outside the United States if the recipient  
3 is within the United States,” after “United States,”.

4 (b) TEXT MESSAGING SERVICE.—Section 227(e)(8)  
5 of the Communications Act of 1934 (47 U.S.C. 227(e)(8))  
6 is amended—

7 (1) in subparagraph (A), by inserting “(includ-  
8 ing a text message sent using a text messaging serv-  
9 ice)” before the period at the end;

10 (2) in the first sentence of subparagraph (B),  
11 by inserting “(including a text message sent using a  
12 text messaging service)” before the period at the  
13 end; and

14 (3) by adding at the end the following:

15 “(D) TEXT MESSAGE.—The term ‘text  
16 message’ means a real-time or near real-time  
17 message consisting of text, images, sounds, or  
18 other information that is transmitted from or  
19 received by a device that is identified as the  
20 transmitting or receiving device by means of a  
21 telephone number. Such term—

22 “(i) includes a short message service  
23 (SMS) message, an enhanced message  
24 service (EMS) message, and a multimedia  
25 message service (MMS) message; and

1                   “(ii) does not include a real-time, two-  
2                   way voice or video communication.

3                   “(E) TEXT MESSAGING SERVICE.—The  
4                   term ‘text messaging service’ means a service  
5                   that permits the transmission or receipt of a  
6                   text message, including a service provided as  
7                   part of or in connection with a telecommuni-  
8                   cations service or an IP-enabled voice service.”.

9                   (c) COVERAGE OF OUTGOING-CALL-ONLY IP-EN-  
10                  ABLED VOICE SERVICE.—Section 227(e)(8)(C) of the  
11                  Communications Act of 1934 (47 U.S.C. 227(e)(8)(C)) is  
12                  amended by striking “has the meaning” and all that fol-  
13                  lows and inserting “means the provision of real-time voice  
14                  communications offered to the public, or such class of  
15                  users as to be effectively available to the public, trans-  
16                  mitted using Internet protocol, or a successor protocol,  
17                  (whether part of a bundle of services or separately) with  
18                  interconnection capability such that the service can origi-  
19                  nate traffic to, or terminate traffic from, the public  
20                  switched telephone network, or a successor network.”.

21                  (d) REGULATIONS.—

22                  (1) IN GENERAL.—Section 227(e)(3)(A) of the  
23                  Communications Act of 1934 (47 U.S.C.  
24                  227(e)(3)(A)) is amended by striking “Not later  
25                  than 6 months after the date of enactment of the

1 Truth in Caller ID Act of 2009, the Commission”  
2 and inserting “The Commission”.

3 (2) DEADLINE.—The Federal Communications  
4 Commission shall prescribe regulations to implement  
5 the amendments made by this section not later than  
6 18 months after the date of the enactment of this  
7 Act.

8 (e) EFFECTIVE DATE.—The amendments made by  
9 this section shall take effect on the date that is 6 months  
10 after the date on which the Federal Communications Com-  
11 mission prescribes regulations to implement the amend-  
12 ments made by this section.

○

[H.R. 1301 follows:]



1

114TH CONGRESS  
1ST SESSION**H. R. 1301**

To direct the Federal Communications Commission to extend to private land use restrictions its rule relating to reasonable accommodation of amateur service communications.

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**IN THE HOUSE OF REPRESENTATIVES**

MARCH 4, 2015

Mr. KINZINGER of Illinois (for himself, Mr. COURTNEY, Mr. FRELINGHUYSEN, Mr. ISRAEL, Mr. GRIFFITH, Mr. KING of New York, Mr. TONKO, Mr. WOMACK, Mrs. NAPOLITANO, Mr. FORTENBERRY, Mr. WALBERG, Ms. JENKINS of Kansas, and Mr. PRICE of North Carolina) introduced the following bill; which was referred to the Committee on Energy and Commerce

---

**A BILL**

To direct the Federal Communications Commission to extend to private land use restrictions its rule relating to reasonable accommodation of amateur service communications.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Amateur Radio Parity  
5 Act of 2015”.

6 **SEC. 2. FINDINGS.**

7 Congress finds the following:

1           (1) More than 700,000 radio amateurs in the  
2 United States are licensed by the Federal Commu-  
3 nications Commission in the amateur radio service.

4           (2) Amateur radio, at no cost to taxpayers, pro-  
5 vides a fertile ground for technical self-training in  
6 modern telecommunications, electronics technology,  
7 and emergency communications techniques and pro-  
8 tocols.

9           (3) There is a strong Federal interest in the ef-  
10 fective performance of amateur radio stations estab-  
11 lished at the residences of licensees. Such stations  
12 have been shown to be frequently and increasingly  
13 precluded by unreasonable private land use restric-  
14 tions, including restrictive covenants.

15           (4) Federal Communications Commission regu-  
16 lations have for three decades prohibited the applica-  
17 tion to amateur radio stations of State and local reg-  
18 ulations that preclude or fail to reasonably accom-  
19 modate amateur service communications, or that do  
20 not constitute the minimum practicable regulation to  
21 accomplish a legitimate State or local purpose. Com-  
22 mission policy has been and is to permit erection of  
23 a station antenna structure at heights and dimen-  
24 sions sufficient to accommodate amateur service  
25 communications.

1           (5) The Federal Communications Commission  
2           has sought guidance and direction from Congress  
3           with respect to the application of the Commission's  
4           limited preemption policy regarding amateur radio  
5           communications to private land use restrictions, in-  
6           cluding restrictive covenants.

7 **SEC. 3. ACCOMMODATION OF AMATEUR SERVICE COMMU-**  
8 **NICATIONS.**

9           Not later than 120 days after the date of the enact-  
10          ment of this Act, the Federal Communications Commis-  
11          sion shall amend section 97.15(b) of title 47, Code of Fed-  
12          eral Regulations, so that such section prohibits application  
13          to amateur service communications of any private land use  
14          restriction, including a restrictive covenant, that—

15                 (1) precludes such communications;

16                 (2) fails to reasonably accommodate such com-  
17          munications; or

18                 (3) does not constitute the minimum practicable  
19          restriction on such communications to accomplish  
20          the legitimate purpose of the private entity seeking  
21          to enforce such restriction.

○

[H.R. 2666 follows:]



1

114TH CONGRESS  
1ST SESSION**H. R. 2666**

To prohibit the Federal Communications Commission from regulating the rates charged for broadband Internet access service.

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 IN THE HOUSE OF REPRESENTATIVES

JUNE 4, 2015

Mr. KINZINGER of Illinois (for himself, Mr. LATTA, Mr. BIHRAKIS, Mr. BARTON, Mr. LANCE, Mr. SHIMKUS, Mrs. BLACKBURN, Mr. OLSON, Mr. POMPEO, Mr. SCALISE, Mr. CRAMER, Mr. COLLINS of New York, Mr. LONG, Mr. GUTHRIE, Mr. JOHNSON of Ohio, Mrs. ELLMERS of North Carolina, Mr. WALDEN, and Mr. UPTON) introduced the following bill; which was referred to the Committee on Energy and Commerce

---

**A BILL**

To prohibit the Federal Communications Commission from regulating the rates charged for broadband Internet access service.

1 *Be it enacted by the Senate and House of Representa-*  
 2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “No Rate Regulation  
 5 of Broadband Internet Access Act”.

6 **SEC. 2. REGULATION OF BROADBAND RATES PROHIBITED.**

7 Notwithstanding any other provision of law, the Fed-  
 8 eral Communications Commission may not regulate the

1 rates charged for broadband Internet access service (as  
2 defined in the rules adopted in the Report and Order on  
3 Remand, Declaratory Ruling, and Order that was adopted  
4 by the Commission on February 26, 2015 (FCC 15–24)).

○

[Small Business Broadband Deployment Act follows:]

F:\CBO\114\TELASMALL\_BUSINESS\_01.XML[Discussion Draft]

**[DISCUSSION DRAFT]**

114TH CONGRESS  
2D SESSION

**H. R.** \_\_\_\_\_

To ensure that small business providers of broadband Internet access service can devote resources to broadband deployment rather than compliance with cumbersome regulatory requirements.

---

IN THE HOUSE OF REPRESENTATIVES

M. \_\_\_\_\_ introduced the following bill; which was referred to the  
Committee on \_\_\_\_\_

---

**A BILL**

To ensure that small business providers of broadband Internet access service can devote resources to broadband deployment rather than compliance with cumbersome regulatory requirements.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Small Business  
5 Broadband Deployment Act”.

1 **SEC. 2. EXCEPTION TO ENHANCEMENT TO TRANSPARENCY**  
2 **REQUIREMENTS FOR SMALL BUSINESSES.**

3 (a) IN GENERAL.—The enhancements to the trans-  
4 parency rule of the Federal Communications Commission  
5 under section 8.3 of title 47, Code of Federal Regulations,  
6 as described in paragraphs 162 through 184 of the Report  
7 and Order on Remand, Declaratory Ruling, and Order of  
8 the Federal Communications Commission with regard to  
9 protecting and promoting the open Internet (adopted Feb-  
10 ruary 26, 2015) (FCC 15–24), shall not apply to any  
11 small business.

12 (b) DEFINITIONS.—In this section:

13 (1) BROADBAND INTERNET ACCESS SERVICE.—  
14 The term “broadband Internet access service” has  
15 the meaning given such term in section 8.2 of title  
16 47, Code of Federal Regulations.

17 (2) SMALL BUSINESS.—The term “small busi-  
18 ness” means any provider of broadband Internet ac-  
19 cess service that has not more than—

20 (A) 1,500 employees; or

21 (B) 500,000 subscribers.

[Whereupon, at 12:05 p.m., the subcommittee was adjourned.]  
[Material submitted for inclusion in the record follows:]

PREPARED STATEMENT OF THE HONORABLE FRED UPTON

Reducing red tape and making the law work for consumers and small businesses has been a focus of this committee under my chairmanship. Today, this subcommittee will hear from a panel of witnesses on four bills that further this important goal in the communications and technology sectors so vital to continued economic growth and job creation in Michigan and across the country.

H.R. 2669, the Anti-Spoofing Act of 2015 and H.R. 1301, the Amateur Radio Parity Act of 2015, are both focused on protecting consumers. Whether it is the abuse of technology by bad actors or the abuse of powers provided by law, consumers deserve honesty and a fair shake. These bills are designed to provide just that. H.R. 2669, introduced by Reps. Meng, Barton, and Lance, would extend the provisions of the Truth in Caller ID Act to text messaging and VoIP services—helping protect consumers from fraud. And H.R. 1301, authored by Rep. Kinzinger, would ensure that those empowered to impose land-use restrictions don't place unnecessary bans on HAM radio equipment.

Additionally, we'll discuss two bills designed to protect consumers and small businesses from future FCC Chairmen. H.R. 2666, Representative Kinzinger's No Rate Regulation of Broadband Internet Access Act and a discussion draft offered by Chairman Walden would ensure that the commitments of this administration against regulating rates or unduly burdening small businesses have staying power. These are both ideas that were generated by the FCC, this legislation would simply make them permanent. I thank the witnesses for their testimony.

---

**BOOTH, FRERET & IMLAY, LLC**

ATTORNEYS AT LAW

ROBERT M. BOOTH, JR. (1911-1981)  
JULIAN P. FRERET (1918-1999)  
CHRISTOPHER D. IMLAY

January 11, 2016

Honorable Greg Walden, Chairman  
Subcommittee on Communications and Technology  
Committee on Energy and Commerce  
United States House of Representatives  
2182 Rayburn House Office Building  
Washington, DC 20515

Honorable Anna G. Eshoo, Ranking Member  
Subcommittee on Communications and Technology  
Committee on Energy and Commerce  
United States House of Representatives  
241 Cannon House Office Building  
Washington, DC 20515

Re: H.R. 1301, the "Amateur Radio Parity Act of 2015"

Greetings.

This letter is written in strong support of H.R. 1301, the Amateur Radio Parity Act. The legislation is absolutely critical to the survival of Amateur Radio, one of the best examples of the spirit of volunteerism and public service that exists in America today. I first want to thank the Subcommittee for your consideration of this Bill.

The undersigned has had the honor to serve for the past 36 years as General Counsel for ARRL, the national association for Amateur Radio (formally known as the American Radio Relay League, Incorporated). ARRL is a Connecticut non-profit association which has for the past 101 years represented and advocated the interests of the nation's 735,000 Amateur Radio operators, all of whom are licensed by the Federal Communications Commission to serve the public, especially in times of natural and other disasters. Amateur Radio exists for a number of reasons, principal among which (as the FCC regulations put it) is its value "to the public as a voluntary noncommercial communication service, particularly with respect to providing emergency communications." The FCC has at times described the Amateur Service as a "model of volunteerism" and a "priceless public benefit."

Amateur Radio operators are not first responders. But in emergencies, and during disasters and their immediate aftermath, volunteer amateur radio operators are ready, willing, able and prepared to provide restoration communications; interoperable communications for first responders which lack that capability; and operations and

logistical support communications for disaster relief organizations and served agencies such as the American National Red Cross and the Salvation Army. We also serve when agencies need additional communications capabilities in order to fulfill their missions, whether or not normal public safety and other land mobile communications systems are still working. Amateur Radio is durable and is not susceptible to the same disruptions caused by disasters as are broadband networks; cellular networks; and even public safety dispatch systems. This is because Amateur Radio does not rely on centralized or decentralized infrastructure. Because of Amateur Radio operators' technical self-training and flexibility, they can and do provide emergency communications with no infrastructure at all. The value of Amateur Radio in disasters is due also to the widespread geographic distribution of the licensees throughout neighborhoods, communities and States and to the residential installations of the stations. There will as the result of those factors *always* be Amateur Radio stations inside and outside a disaster area, capable of providing reliable, immediate disaster relief communications instantly, within or outside the disaster area, over any path distance and to any location whatsoever. The level of organization and preparedness comes from regular drills, exercises and emergency simulations using these residential radio stations and their integration into emergency planning. Emergency preparedness requires actively developing the experiential knowledge of radio and the operating skills a licensee must have in order to be useful during a disaster. This learning requires frequent practice that takes place at a home station during a licensee's personal free time. The operators are certified, having completed emergency communications certification courses that provide the educational background necessary for such serious work, and the stations are maintained within the licensees' residences in a constant state of readiness. This cannot be done without residential, outdoor antennas.

Federal Emergency Management Agency (FEMA) Director Craig Fugate, at an FCC earthquake forum concerning emergency communications planning in 2011, stated that:

“Finally, I have got to get back to Amateur Radio... They are the first ones in the first days getting the word out as the other systems come back up. I think that there is a tendency (to believe) that we have done so much to build infrastructure and resiliency in all of our other systems, we have tended to dismiss that role -when everything else fails, Amateur Radio often times is our last line of defense. And I think at times we get so sophisticated, and we have gotten so used to the reliability and resilience in our wireless and wired and our broadcast industry, and in all our public safety communications, that we can never fathom that they will fail. They do. They have. They will. When you need Amateur Radio (operators), you really need them.”

Amateur Radio is available, ready, willing and able to provide these services at no cost to anyone. As FEMA Director Fugate noted, Amateur Radio operators are always there, using their own radios, on their own frequencies, and “nobody pays them.” Indeed, we will be there “when all else fails.”

The one absolute necessity for Amateur Radio stations to function, however, is some form of outdoor antenna. These need not be elaborate structures with substantial aesthetic impact; but they must be efficient, reliable, fixed antennas and they must be installed in residential areas in order to be usable by licensees on an ongoing basis for emergency drills and exercises, and so they will be ready to be used when the next disaster strikes. Now, some 90 percent of new housing starts in the United States are subject to deed restrictions, homeowners' association rules, and other limitations on the use of land which increasingly make installation of outdoor Amateur Radio antennas impossible.

Private land use regulations are not "contracts" in the sense that there is any meeting of the minds between the buyer and seller of land with respect to them. Rather, they are simply restrictions on the use of owned land, imposed by the developer of a subdivision on all lots in the subdivision when it is first created. If an Amateur Radio licensee wants to buy a home in a subdivision burdened by deed restrictions from either the developer or from an existing resident, that licensee has precisely two options: buy the residence subject to the restrictions, or do not buy the residence. There is no negotiation possible because the restrictions are already in place. Lenders for real estate developments require the declaration of deed restrictions as a condition of funding the development project and the restrictions bind every property in the subdivision.

Deed restrictions, the language of which is propagated from one subdivision to the next, invariably contain one of two types of provisions with respect to antennas: they say either "no outdoor antennas" or "no outdoor antennas without the approval of the Homeowners' Association." In the latter case there are invariably no standards governing when HOA approval might be given or withheld. There is no negotiation possible and therefore no contractual element at all. A person seeking to purchase a residence in a deed restricted community containing the latter type language, even if he or she is aware of the terms of the CC&Rs applicable to the subdivision, cannot know when the property is purchased whether or not any antenna will or will not be approved. In ARRL's extensive experience, the answer to a request made by a landowner of an HOA for approval of any antenna is invariably in the negative. The reason for the negative response is that, no matter how insignificant the aesthetic impact of an Amateur Radio antenna installation, the safest thing for a homeowners' association to do is to deny approval for the antenna, rather than risk criticism from another homeowner.

Often, therefore and ever-increasingly, because of the intensive proliferation of antenna-preclusive private land use regulations, a licensed radio Amateur must purchase property in a deed restricted community and suffer a complete prohibition on Amateur Radio operation due to the covenant language itself or the completely subjective and arbitrary determination of a homeowner's association or architectural control committee as to whether an Amateur Radio station can be operated at all from the licensee's home. With the prevalence of private land use regulations currently, there is most often no choice in the matter. Radio amateurs are increasingly precluded entirely from installing and maintaining any outdoor antenna at all. In an otherwise vibrant, growing public service avocation, the Amateur Service is facing "death by a thousand cuts." FCC has

acknowledged that private land use regulations are used as a means of precluding the use of outdoor antennas. See, *Preemption of Local Zoning Regulation of Satellite Earth Stations and In re Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*; 11 FCC Rcd. 19276, 19301, at fn 12 (1996), [“(r)estrictive covenants are ... used by homeowners’ associations to prevent property owners within the association from installing antennas.”].

The FCC, thirty years ago, found that there was a “strong Federal interest” in supporting effective Amateur Radio communications. FCC also found that municipal zoning ordinances and building codes often unreasonably restricted or precluded Amateur Radio antennas in residential areas. The FCC, in a docket proceeding referred to as “PRB-1” issued in 1985 a Declaratory Ruling which created a three-part test balancing the strong Federal interest in Amateur Radio communications with the traditionally local municipal land use authority. FCC held that State or local land use regulations: (A) cannot preclude Amateur Radio communications; (B) must make “reasonable accommodation” for Amateur Radio communications; and (C) must constitute the “minimum practicable restriction” in order to accomplish a legitimate municipal purpose. This Declaratory Ruling was codified as 47 C.F.R. § 97.15(b). This flexible policy was intended to and did preserve all municipal jurisdiction over antenna regulation, and FCC was very clear that it would not be adjudicating the local land use regulations itself. It worked like a charm: thereafter, municipal land use regulators and Amateur Radio operators sat at a table and cooperatively negotiated ordinances, conditional use permits and variance applications. Today, there is very little adverse interaction between municipal land use planners and Amateur Radio groups or individual licensees.

Thirty years ago, however, private land use regulations were not as prevalent as they are now. Since then, ARRL has repeatedly asked FCC to extend the three-part “reasonable accommodation” test evenly to all types of land use regulations, because it makes logical sense to do so. It doesn’t matter whether the strong Federal interest in Amateur Radio communications that FCC acted to protect in 1985 is frustrated by the preclusion of an Amateur station by zoning or by private land use regulation; the effect is precisely the same either way. FCC has urged homeowner’s associations to apply the “reasonable accommodation” test where Amateur Radio stations were affected. FCC’s Wireless Telecommunications Bureau, in an *Order* released November 19, 1999, stated that the Commission “strongly encourage(s)” homeowner’s associations to apply the “no prohibition, reasonable accommodation, and least practicable regulation” three-part test to private land use regulation of Amateur radio antennas:

“...we ...strongly encourage associations of homeowners and private contracting parties *to follow the principle of reasonable accommodation and to apply it to any and all instances of amateur service communications where they may be involved.*” *Order*, DA 99-2569 at ¶ 6 (1999).

However, FCC has informed ARRL repeatedly that in order for it to extend the principle of 47 C.F.R. §97.15(b) to include private land use regulations, some guidance from

Congress would be needed. Indeed, it makes no sense whatsoever to apply a reasonable accommodation test to one type of preclusive land use regulation but not another; if there is a “strong Federal interest” in Amateur Radio communications, it does not matter whether those communications are precluded by municipal land use regulations or by private land use regulations. The effect is precisely the same in each case.

H.R. 1301 would do no more than to call upon FCC to extend its “no preclusion, reasonable accommodation, least practicable regulation” test to all types of land use regulation of Amateur Radio facilities. *The Bill does this without taking any jurisdiction or decisionmaking authority away from homeowners’ associations whatsoever.* An Amateur Radio operator living in a deed restricted community would, after passage of H.R. 1301 still have to apply to his or her HOA for authorization to install any outdoor antenna; the HOA could approve or disapprove any given proposal based on aesthetic considerations; and the only obligation that the HOA would have is to not preclude outdoor antennas entirely, but instead to make some reasonable accommodation for an antenna, given the characteristics of a particular parcel of land at issue. There are many, many options for Amateur Radio antennas in residential areas, including some with no aesthetic impact at all, so the aesthetic concerns of HOAs can be protected at the same time that an Amateur Radio operator’s ability to provide public service communications using an efficient, effective outdoor is ensured. ARRL anticipates that this process will be effectuated cooperatively with HOAs at the local level, just as it has worked with municipal land use planners seamlessly for the past 30 years.

FCC declared in 1996, when enacting regulations (as instructed by Congress) to preempt government and private land use regulations restricting the use of over-the-air video reception devices in residential areas (47 C.F.R. §1.4000), that (1) it has the jurisdiction to preempt private land use regulations that conflict with telecommunications policy; and (2) that private land use regulations are related primarily to aesthetic concerns and *it is therefore appropriate to accord them less deference than local governmental regulations that can be based on health and safety considerations as well as aesthetics.* The “reasonable accommodation” policy would nevertheless protect the decisionmaking authority of HOAs and the policy would be administered by HOAs just as municipalities administer it now.

ARRL has recently noted, and you may have heard some material misstatements of fact and disturbingly inaccurate conclusions about H.R.1301 and its Senate counterpart, S. 1685. The claim has been made that this Bill would mandate the authorization of “75 foot towers throughout each community”. The truth is that there is absolutely nothing in the FCC’s 30-year-old reasonable accommodation policy that would mandate or authorize “75-foot towers” “throughout” a community, whether that community is regulated by municipal zoning and building codes or by private land use regulations, or both. Antenna height, configuration and the extent to which an antenna is aesthetically compatible on a given parcel of residential land is now subject to municipal jurisdiction and, should H.R.1301 pass, it would continue to be subject to homeowners’ association jurisdiction as well. The *only* obligation of an HOA within a subdivision regulated by private land use regulations would be the same as that which is applicable to

municipal land use regulators now: the HOA (1) could not preclude Amateur Radio communications; (2) it must reasonably accommodate Amateur Radio communications; and (3) the HOA regulations must constitute the minimum practicable regulation consistent with the HOA's legitimate purpose (i.e. aesthetics). How that is done in each and every case would be left to the good faith discretion of the HOA, just as it is left to the discretion of municipal land use regulators now.

It has also been suggested that this legislation would "prohibit association review or approval" of Amateur Radio "towers and large, fixed antennas." There is nothing in H.R. 1301 which would "prohibit" community association review or approval of Amateur Radio antennas. Nor is there anything that would mandate "radio towers" or "large, fixed antennas." The question in each case, with respect to each parcel of residential real property is what is reasonable with respect to *that parcel*. That decision in every case would be made by the HOA, premised on good faith negotiation with the FCC-licensed Amateur Radio operator. *H.R. 1301 preserves all HOA jurisdiction to review and approve each individual proposed antenna installation.*

It has been alleged that "H.R. 1301 pre-empts community associations' architectural guidelines and rules related to installation of ham radio towers and antennas" to the point that HOAs "would not be able to require prior approval for 70' ham radio towers and antennas nor would community associations have the ability to create reasonable processes and aesthetic guidelines." That is a complete misrepresentation. The legislation does not preempt HOA's architectural guidelines or rules regarding amateur radio antennas (unless those rules, or the language of the deed restrictions, covenants, HOA regulations or architectural guidelines prohibit outdoor antennas *completely*). An HOA, in the exercise of its normal review processes for proposed antennas, would be obligated only to make reasonable accommodation and to not impose restrictions that are more than what is practically necessary to achieve the HOA's (aesthetic) goal. The HOA would continue to have the authority to require prior approval for any given outdoor antenna installation (just as municipal land use regulators are now able to require prior approval in the form of building permits or conditional/special use permits for antenna installations) and "reasonable processes and aesthetic guidelines" are precisely what the FCC reasonable accommodation policy calls for.

In conclusion, an Amateur Radio station is like a fire extinguisher on the wall. It has to be there and ready when a disaster strikes, and Amateur Radio's resilience during natural disasters and the ubiquitous geographic distribution of the stations in residences and their preexisting readiness are the factors that make the Service valuable when the emergency occurs. Emergency communications are not the only justification for having a functional, operating Amateur station at one's residence. FCC's rules (47 C.F.R. §97.3) set forth numerous Federal objectives for the Amateur Service. Congress has on numerous occasions noted these benefits as well: Public Law 103-408 in 1994, a Joint Resolution to recognize the achievements of radio amateurs, and to establish support for such amateurs as national policy, called for reasonable accommodation for Amateur Radio from residences. It declared that Amateurs are to be "commended for their

contributions to technical progress in electronics, and for their emergency radio communications in times of disaster;” and that the FCC is “urged to make “reasonable accommodation for the effective operation of Amateur Radio from residences, private vehicles and public areas;” and to “facilitate and encourage amateur radio operation as a public benefit.”

H.R. 1301 is critically necessary to the long term survival of the Amateur Radio Service. Our Service provides unlimited opportunities for technical self-training, international goodwill, volunteerism and technical experimentation. It is good for very young people and very old people and everyone who suffers during natural or man-made disasters. It provides a basis for technical careers for many and it advances telecommunications technology. It contributes to STEM education. We are grateful for the many cosponsors of this legislation for their leadership and foresight and we ask for the opportunity to continue our avocation in the public interest for the next 100 years.

Respectfully submitted,

A black rectangular redaction box covering the signature of Christopher D. Imlay.

Christopher D. Imlay  
General Counsel  
ARRL, the national association for Amateur Radio

Thomas M. Skiba, CAE  
Chief Executive Officer  
Community Associations Institute  
Statement for the Record  
H.R. 1301, the Amateur Radio Parity Act  
House Energy and Commerce Committee  
Subcommittee on Communications and Technology  
January 12, 2016

**Contents**

The Community Association Model of Housing ..... 1  
Overview of FCC Preemption of State and Local Laws & Exemption for Private Land Use  
Agreements ..... 3  
H.R. 1301 Overrides Private Contracts..... 7  
Community Associations and Amateur Radio..... 9  
Rights of Property Owners, Importance of Local Control, & H.R. 1301 ..... 10  
Common Ground: Suggested Amendments H.R. 1301..... 11

On behalf of the more than 66 million Americans who live in community associations—often referred to as homeowners associations, planned communities, condominiums, or housing cooperatives—Community Associations Institute (CAI) submits the following statement concerning H.R. 1301, the Amateur Radio Parity Act, for the committee’s consideration.

CAI is the only nationwide membership organization dedicated to the community association model of homeownership. CAI members are homeowners, association board members, managing agents and business partners who work tirelessly to improve the community association model of housing. CAI members have a keen focus on homeowner and board member education, development and enforcement of best practices and ethical standards, and raising standards through credentialing and continuing education requirements for community association professionals. CAI’s more than 33,500 members are organized in more than 60 chapters.

**The Community Association Model of Housing**

Community associations are not-for-profit corporations organized under state law and established pursuant to a declaration of covenants. Community association

membership is mandatory and automatic, based on a person's ownership of real property subject to a declaration of covenants.

#### *Duties of Community Association Boards*

Community associations are governed by a volunteer board of directors, neighbors elected by neighbors, to manage the association's affairs pursuant to state law and the declaration of covenants. The responsibilities of a community association board may vary according to housing type (i.e. high-rise cooperative or planned community) and if the community is organized as a singular association or a series of semi-autonomous sub-associations within a master association.

In general, a community association board acts to maintain common community infrastructure such as a community's roads, sidewalks, bridges, culverts, parks, and street lighting. It is also common for community associations to contract for refuse collection and snow removal services. In a condominium or a cooperative, the association is additionally responsible for maintenance of the roofs, hallways, stairwells, balconies, and other critical building infrastructure while homeowners are typically responsible for interior maintenance of their units. Association boards also enforce the community's architectural standards.

#### *Community Associations not Units of Government*

Despite providing municipal-type services for owners and residents, community associations are not units of government, but are private entities. Community associations are neither vested with nor exercise authorities typically and routinely associated with state and local government. Rather, most community association boards focus on stability of the association's finances, maintenance of common property, and enforcement of the association's covenants, conditions, and restrictions (CC&Rs).

#### *Residents Report Satisfaction with their Community Association*

In 2014, Public Opinion Strategies conducted a nationwide survey of community association homeowners to determine resident satisfaction with community associations.<sup>1</sup> According to the survey results, 90 percent of homeowners rated their community association experience as positive (64 percent) or neutral (26 percent). More than 82 percent of residents stated they get along well with their neighbors and more than 90 percent of residents said they are on friendly terms with their association board. These data are similar to historical data on association homeowner satisfaction.

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<sup>1</sup> *Americans Grade Their Associations, Board Members, and Community Managers, 2014: Foundation for Community Association Research*

*Overwhelming Opposition to New Government Regulation of Community Associations*

The 2014 Public Opinion Strategies survey asked respondents if they would prefer more or less government regulation of their association. An overwhelming 86 percent of respondents said they want less or no additional government control over their neighborhood. Given the local nature of community associations and the neighborhoods they serve, it is not surprising that homeowners believe their association needs less government regulation and intervention rather than more regulation and intervention.

**Overview of FCC Preemption of State and Local Laws & Exemption for Private Land Use Agreements**

H.R. 1301 applies the Federal Communications Commission's (FCC or Commission) broad preemption of state and local government laws and ordinances pertaining to amateur service communications to community association CC&Rs. Section 3 of H.R. 1301 directs the FCC to amend its regulations at 47 CFR § 97.15(b) to prohibit the application of any private land use restriction to amateur service communications that does not comply with the Commission's "reasonable accommodation" standard applicable to state and local governments.<sup>2</sup>

*Amateur Operator Objections to Location, Height, & Aesthetic Guidelines*

The Commission's "reasonable accommodation" standard, often referenced as PRB-1, preempts state and local laws and ordinances that fail to provide an amateur services licensee opportunity to deploy an effective amateur services station. The PRB-1 standard was adopted by the Commission in response to amateur radio operator objections to municipal land regulations requiring that amateur station antennas be located in specific locations (a side or rear yard) and be subject to height limitations.

Amateur operators objected to these restrictions, claiming the restrictions precluded amateur service communications. Amateur operators argued their ability to effectively broadcast is directly related to the location and height of an amateur station antenna. Amateur operators also objected to permitting fees and restrictions adopted for aesthetic purposes. In describing these objections, the Commission wrote, "...amateurs contend, almost universally, that *"beauty is in the eye of the beholder."* They assert that an antenna installation is not more aesthetically displeasing than other objects

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<sup>2</sup> PRB-1—Memorandum Opinion and Order (FCC 85-506): *Federal preemption of state and Local Regulations Pertaining to Amateur Radio Facilities*, September 16, 1985.

people keep on their property, e.g. motor homes, trailers, pick-up trucks, solar collectors and gardening equipment.”<sup>3</sup>

Preemption of Local Land Regulations & Accommodation of Effective Communications

The Commission decided in favor of amateur radio operators on the question of local land use regulation, a traditional authority of state and local government. Noting that local governments had a continuing interest in land use policy, the Commission opined, “The cornerstone on which we will predicate our decision is that a reasonable accommodation may be made between the two sides.”<sup>4</sup>

Notwithstanding the stated goal of accommodating the interests of both municipalities and amateur radio operators, in clarifying the extent of its preemption of state and local laws and ordinances the FCC subordinated the interests of state and local governments to those of the amateur licensee’s. The Commission wrote—

*“Because amateur station communications are only as effective as the antennas employed, antenna height restrictions directly affect the effectiveness of amateur communications. Some amateur antenna configurations require more substantial installations than others if they are to provide the amateur operator with the communications that he/she desires to engage in...local regulations which involve placement, screening or height of antennas [sic.] based on health, safety, or aesthetic considerations must be crafted to accommodate reasonable amateur communications and to represent the minimum practicable regulation to accomplish the local authority’s legitimate purpose.”<sup>5</sup>*

The Commission expanded on this standard in a subsequent order concerning the PRB-1 reasonable accommodation standard. The Commission expressly rejected an interpretation of PRB-1 that local entities were only required to balance local interests with the federal interest in amateur service communications. The Commission restated the PRB-1 reasonable accommodation standard placing a burden on the local entity seeking to enforce a restriction to demonstrate the restriction is the minimum burden imposed on an amateur operator in pursuit of a legitimate purpose. The Commission wrote, “Given this express Commission language, it is clear that a “balancing of interests” approach is not appropriate in this context.”<sup>6</sup> Courts have since interpreted

<sup>3</sup> PRB-1, paragraph 8.

<sup>4</sup> *Ibid.*, paragraph 22.

<sup>5</sup> *Ibid.*, paragraph 25.

<sup>6</sup> Order (FCC 99-2569) PRB-1 (1999), paragraph 7.

the PRB-1 standard as imposing certain burdens of process and proof on localities seeking to enforce a restriction concerning amateur service communications.<sup>7</sup>

Private Land Use Agreements and Leases Protected from Preemption

The Commission did not apply the PRB-1 order to private land use restrictions and covenants, writing, "*Amateur operators also oppose restrictions on their amateur operations which are contained in the deeds for their homes or in their apartment leases. Since these restrictive covenants are contractual agreements between private parties, they are not generally a matter of concern to the Commission.*"<sup>8</sup> The Commission restated its decision not to preempt the private agreements of land owners as footnote 6 to the PRB-1 order, stating "*We reiterate herein does not reach restrictive covenants in private contractual agreements. Such agreements are voluntarily entered into by the buyer or tenant when the agreement is executed and do not usually concern this Commission.*"<sup>9</sup>

FCC Repeatedly Rejects Expansion of PRB-1 to Private Land Use Agreements

Amateur radio operators have sought to require the FCC to extend its preemption of land use regulations to encompass private land use agreements. The Commission has on at least three occasions declined to do so.

- In 1999 the Commission responded to a petition to extend the PRB-1 ruling to private land use agreements by concluding, "*...we are not persuaded by the Petition or the comments in support thereof that specific rule provisions*

<sup>7</sup> In *Williams v. City of Columbia*, 707 F. Supp. 207 (D.S.C. 1989), the court raised the issue of balancing of interests between local governments and the federal government. The court wrote, "*Perhaps more important, federal judicial encroachment of an area of almost exclusive state and local control should not be lightly undertaken. As a result, local zoning boards are best suited to strike the proper balance between the federal interests outlined in PRB-1 and the strong local interests in regulating land use and zoning.*"

In *Pentel v. City of Mendota Heights, Minnesota*, 13 F. 3d 1261 (8<sup>th</sup> Cir. 1994), the 8<sup>th</sup> circuit took a different approach to the question of reasonable accommodation, determining that Mendota Heights failed to reasonably accommodate plaintiff Pentel by denying a variance request without creating a record of fact, providing justifications for its denial, and failing to inform plaintiff of actions that could be taken to obtain approval.

The FCC's 1999 clarification that the "balancing of interests" approach was not consistent with the preemption of PRB-1 has led to other courts following the Pentel test for reasonable accommodation. In *Boscher v. Township of Algoma*, 246 F. Supp. 2d 791 (W.D. Mich. 2003), the court determined that Algoma complied with the PRB-1 reasonable accommodation by (1) having a "firm understanding of the requirements of PRB-1"; (2) having "attempted to compromise with plaintiff"; and (3) retained the services of a professional consultant to evaluate plaintiff's application.

<sup>8</sup> PRB-1 (1985), paragraph 7.

<sup>9</sup> *Ibid.*, paragraph 25, footnote 6.

*bringing the private restrictive covenants within the ambit of PRB-1 are necessary or appropriate at this time.”<sup>10</sup>*

- In 2000, the Commission denied a reconsideration request, writing “*we believe that the PRB-1 ruling correctly reflects the Commission’s preemption policy in the amateur radio context.*”<sup>11</sup>
- In 2001, the Commission again denied a reconsideration request, pointedly stating, “*...we conclude that the Bureau’s denial of the subject petitions for reconsideration, insofar as they pertain to inclusion of CC&Rs in private covenants, was correct and should be affirmed.*”<sup>12</sup>

2012 FCC Report Reinforces Prior Determinations, States No Need for Legislation

The Middle Class Tax Relief and Job Creation Act of 2012 directed the Commission to undertake a study of, among other things, the impediments private land use restrictions present to amateur service communications.<sup>13</sup> The Commission was directed to identify “impediments to enhanced amateur radio service communications, such as private land use restrictions on residential antenna installations...” and to submit to Congress “...recommendations regarding the removal of such impediments.”<sup>14</sup>

With regard to private land use restrictions acting as an impediment to enhanced amateur services communications, the Commission wrote—

*“Moreover, while commenters suggest that private land use restrictions have become more common, our review of the record does not indicate that amateur operators are unable to find homes that are not subject to such restrictions. Therefore, at this time, we do not see a compelling reason for the Commission to revisit its previous determinations that preemption should not extend to CC&Rs.”<sup>15</sup>*

The Commission explicitly stated that no additional legislative authority or action by Congress on the matter of amateur service communications and private land use restrictions is necessary. The Commission wrote—

<sup>10</sup> PRB-1 (1999), paragraph 6.

<sup>11</sup> Order on Reconsideration (RM 8763) PRB-1 (2000 – Reconsideration), paragraph 6.

<sup>12</sup> Order on Reconsideration (RM 8763) PRB-1 (2001), paragraph 9.

<sup>13</sup> P.L. 112-96, Section 6414.

<sup>14</sup> P.L. 112-96, Section 6414(b)(2)(A) and (B).

<sup>15</sup> GN Docket No 12-91—Uses and Capabilities of Amateur Radio Service Communications in Emergencies and Disaster Relief: Report to Congress Pursuant to Section 6414 of the Middle Class Tax Relief and Job Creation Act of 2012 (August 2012), paragraph 39.

*"As noted above, the Commission has already preempted state and local regulations that do not reasonably accommodate amateur radio communications and that do not constitute the minimum practical regulations to accomplish the local authority's legitimate purpose...Consequently, we do not believe that Congressional action is necessary to address any of these issues."*<sup>16</sup>

### **H.R. 1301 Overrides Private Contracts**

A fair reading of the record of FCC consideration of its PRB-1 ruling and subsequent rulings, reconsiderations, and reports clearly shows the Commission has great respect for private agreements valid under state law and freely entered into by the respective parties. H.R. 1301 abandons the Commission's historical regulatory restraint by treating community association covenants as if these legal instruments were imposed by third parties on unsuspecting amateur radio operators.

#### *Disclosure of Community Standards Prior to Purchase*

CAI members strongly desire that community associations be welcoming communities in demand by all consumers, including amateur radio operators. This is a leading reason behind CAI members' strong support of and advocacy for statutes that provide meaningful and actionable disclosure of all association rules and guidelines prior to purchase. CAI members support state statutes that ensure such disclosure occurs well in advance of closing and that a consumer has the right to cancel a purchase contract without penalty on the basis of their review of a community's CC&Rs.

It does no party any benefit if a homeowner does not have a clear understanding of a community's requirements prior to purchasing or leasing a home in a community association. These prior disclosure requirements under law mean amateur radio operators are similarly situated with all other homeowners or potential purchasers. Owners in a community association each had the opportunity to review community rules and by closing the real estate transaction became contractually bound to their community and each one of their neighbors to abide by community standards. Every licensee has (A Priori) an opportunity to know and understand the restrictions related to their property prior to purchase.

#### *Architectural Standards and Variance Requests*

Community association boards understand the reality that it is unlikely a community's rules and architectural standards will anticipate every potential need of a homeowner.

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<sup>16</sup> Report to Congress (August 2012), paragraph 40.

Accordingly, the vast majority of associations will consider variance requests to architectural standards through an architectural review process.

The architectural review process varies based on the form of association, but the underlying goal is the same. Property owners made the decision to purchase their home with the clear understanding that property standards will be enforced to the community's general benefit. In almost every association modifications to the exterior of property or modifications visible from a unit's exterior are subject to an architectural review process.

Most community associations will consider an amateur radio operator's request to install an external antenna or tower through the architectural review process. As has been discussed, the architectural review process applies to all owners and residents evenly and applies to all external modifications, visible or otherwise. An amateur radio operator submitting a request for an external tower and antenna is more likely to receive approval for the external structures if the request is made consistent with the community's standards. An amateur radio operator who fails to adhere to a community's standards is less likely to receive approval.

*H.R. 1301 Overrides Covenants that Apply to Amateur Radio*

H.R. 1301 is a clear preemption of lawful agreements between private parties over the use of privately owned land. H.R. 1301 vitiates portions of community association CC&Rs that prohibit broadcasting from within a community. H.R. 1301 will further vitiate portions of covenants that do not comply with the FCC's "reasonable accommodation" standard. This latter preemption supplants the existing process the majority of community associations use to review and manage requests to install external antenna for amateur radio broadcasting.

The preemption in H.R. 1301 directly affects the decision making process of almost every community association by forcing the association to adopt a federal policy intended for local governments. Congress is contemplating a very aggressive intrusion at the most micro level of civil society, imposing its preferences onto private parties who have freely and lawfully entered into contract concerning land use.

Congress is not contemplating such action to correct an historical wrong or address a national emergency. The legislation does not address any federal interest sufficiently compelling to justify such interference with state sovereignty over land use policy and common contract law.<sup>17</sup>

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<sup>17</sup> Report to Congress (August 2012), paragraph 39.

Congress is overriding private contracts for the benefit of a hobby activity.<sup>18</sup> CAI members believe this intrusion into the workings of community associations is unjustified and violates the rights and expectations of all other community residents.

With more than 66 million Americans living in community associations, this type of federal intervention paves the way for interest groups seeking special exceptions from their contractual obligation with their local community association. Community associations are creatures of state law through the Uniform Common Interest Ownership Act, well-vetted balanced legislation governing the development, administration and management of state-incorporated community associations.

### **Community Associations and Amateur Radio**

In late 2014, CAI members were surveyed concerning amateur radio to determine common community rules and approaches to accommodating amateur radio. Data was collected from approximately 1,100 respondents across 46 states covering a minimum of 535,000 housing units. Respondents also indicated a wide variety of housing type, reporting data from condominium associations, housing cooperatives, planned communities, townhome communities, and communities with a mixture of housing types.

#### *Survey Finding: Majority of Associations do not Preclude Amateur Communications*

Approximately 35 percent of respondents indicated a community prohibition on external installation of non-OTARD compliant antennas or amateur service communications. Approximately 40 percent of respondents reported installation of external antenna or towers would require prior approval and compliance with architectural standards. Approximately 25 percent of respondents indicated their communities' governing documents made no reference whatsoever to amateur radio or amateur radio towers and antennas.

#### *Survey Finding: Majority of Associations Have no Record of Amateur Radio Denials*

The majority of respondents indicated that the communities in question had not denied amateur radio antenna installations or had no record of such a denial. Combined, this accounted for approximately 90 percent of respondents, with 63 percent reporting no denials and 27 percent either unsure or having no record of a denial.

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<sup>18</sup> The American Radio Relay League writes that "Amateur Radio (ham radio) is a popular hobby and service that brings people, electronics and communication together." See <http://www.arrl.org/what-is-ham-radio> (visited January 11, 2016).

Survey Finding: Strong Support for Consideration of External Antenna Requests through Association Process

An overwhelming 77 percent of respondents indicated that installation of external amateur radio antennas and towers should be subject to community rules. Only 10 percent of respondents indicated a preference that architectural standards should not apply to external amateur radio antennas and towers.

Support for community architectural standards was almost unanimous—95 percent of respondents agreed their community’s architectural guidelines are important and protect the value of their home.

**Rights of Property Owners, Importance of Local Control, & H.R. 1301**

Survey data explain why CAI members do not believe H.R. 1301, in its current form, is good public policy or even necessary. Notwithstanding this belief, CAI members recognize federal ownership and control of the radio spectrum. CAI members acknowledge the stated federal interest in the amateur communication services. CAI members further understand the view of many in the U.S. House of Representatives and of some in the U.S. Senate that community associations should work affirmatively to offer greater support for the amateur communication services.<sup>19</sup>

In recognition of these views and consistent with the goal of ensuring community associations are welcoming to all individuals and families, CAI members would not oppose legislation limiting the ability of community associations to preclude amateur service communications through prohibitions on such broadcasting included in a declaration of covenants or association guideline or rule.

Beyond this, CAI members strongly believe the role of association homeowners and residents to establish and enforce architectural, maintenance, and safety standards must be retained. These basic association functions should not be usurped by the federal government.

The FCC has previously voiced concern that application of its “reasonable accommodation” standard to community associations would not be as smooth as some suggest. The Commission wrote—

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<sup>19</sup> CAI members also acknowledge encouragement of the FCC that community associations work to accommodate the interest of amateur radio operators.

*"We note that ARRL is proposing a policy of reasonable accommodation, as opposed to the total preemption imposed in the OTARD proceeding. **Nonetheless, given the great variance in the size and configuration of amateur antennas, we are concerned that such a policy would be considerably more complicated for HOAs and ACCs to administer.**"<sup>20</sup>*

### Common Ground: Suggested Amendments H.R. 1301

To ensure local, homeowner control over community association matters, CAI members urge that H.R. 1301 be further amended to reinforce the association role in determining and enforcing architectural standards that may apply to amateur service communications and installation of amateur radio antennas and towers. This is consistent with the concepts of local control over land use and established association law and jurisprudence in the states.

CAI members believe the following elements are necessary to protect the legitimate interests of all association homeowners and residents when developing and enforcing architectural standards that may apply to amateur service communications—

1. Prior notice from an amateur service licensee of intent to install an external antenna, tower, or other apparatus necessary for carrying on amateur service communications;
2. Association authority to enjoin installation of any antenna, tower, or other apparatus necessary for carrying on amateur service communications on commonly owned property or property maintained by the association;
3. Association authority to establish written rules concerning safety, height, location, size, and installation requirements for external antennas, towers, or other apparatus necessary for carrying on amateur service communications;
4. Accommodation of the interests of all homeowners and residents, including those of an amateur services licensee, in establishment of any written rule related, but not limited to, sight easements, interference with air, light, and open space, or the permitted height of principal structures in relation to external antennas, towers, or other apparatus necessary for carrying on amateur service communications; and
5. Direction that an association may not adopt and enforce written rules that by intent or effect preclude amateur service communications.
6. Construction or modification of a structure must be in compliance with all applicable building codes and engineering standards.

<sup>20</sup> PRB-1 (2001), paragraph 8 (emphasis added).

7. The licensee must provide proof of appropriate risk coverage for all external devices and structures.

CAI members do not oppose amateur service communications and appreciate the role of amateur service operators in times of national or local emergency. Nevertheless, CAI members strongly support the long-standing principles of state and local control of land use policies and the right of parties to lawfully contract.

### Conclusion

CAI members respectfully, but strongly, urge the Committee to consider the practical consequences of substituting the wisdom of the Congress for that of neighbors in such a matter. Community association residents have for many decades shown that neighbors can manage local issues like architectural standards without threat, interference, or assistance from the Congress or other instrumentality of the federal government.

Amateur radio operators should be encouraged to follow the same procedures as all other residents of the association in seeking a variance from association guidelines. Taking the time to meet the association's request guidelines, providing an accurate description of the actual variance sought, communicating with neighbors, and obtaining approval before beginning the installation of an external communications device are will greatly improve an amateur radio operator's opportunity to secure approval of their request. These are common steps that must be taken to gain approval for most variance requests and do not apply solely to amateur radio operators. CAI urges amateur radio operators to take a constructive rather than combative approach with their neighbors. Community associations work best when owners come together to manage and support the operations and activities in their community for the benefit of all members of the community.

CAI members look forward to additional productive conversations with organizations representing the interests of amateur service licensees and this Committee to ensure amateur radio operators have opportunity to broadcast from community associations and to preserve the rights under contract of property owners to manage, protect, and preserve their property interests.



Federal Communications Commission  
Washington, D.C. 20554

January 11, 2016

The Honorable Fred Upton  
Chairman  
Committee on Energy and Commerce  
2125 Rayburn House Office Building  
Washington, DC 20515

The Honorable Steve Chabot  
Chairman  
Committee on Small Business  
2361 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Greg Walden  
Chairman  
Subcommittee on Communications and  
Technology  
2125 Rayburn House Office Building  
Washington, DC 20515

The Honorable Bob Latta  
Vice Chairman  
Subcommittee on Communications and  
Technology  
2125 Rayburn House Office Building  
Washington, DC 20515

Dear Mr. Chairmen,

Thank you for your November 19, 2015 letter to Chairman Wheeler of the Federal Communications Commission (FCC) regarding the temporary small business exemption from the Net Neutrality Order's "enhanced transparency requirements". As you know, we dissented from last year's Net Neutrality decision, arguing that it was unlawful and would impose unnecessary and unjustified burdens on providers. To provide at least a modicum of relief for some providers, however, we believe that the FCC should at least make the small business exemption permanent. Unfortunately, on December 15, 2015, the FCC's Consumer and Governmental Affairs Bureau issued a Report and Order that declined to do so. We write to draw your attention to this flawed ruling and seek your further input.

Specifically, despite the near unanimous concerns of commenters in the record about applying new burdens to small businesses, the item merely extends the temporary exemption until December 15, 2016. Additionally, the item declined to change the threshold for the exemption during this period to align it with the definition set by the Small Business Administration for small telecommunications carriers, or even the FCC's SBA-approved definition of a small wireless carrier.

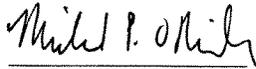
The record in the FCC proceeding made clear that small providers have fewer resources to devote to enhanced transparency requirements. Therefore, as you note in your letter, the rules

would have a disproportionate impact on small businesses if they ultimately go into effect. In fact, as you described, these requirements could even jeopardize the ability of small ISPs to deploy and offer broadband service in their communities, to the detriment of consumers that could benefit from new or improved service. By failing to make the exemption permanent, the FCC missed an opportunity to remedy these concerns and take this issue off the table. Instead, providers face prolonged uncertainty and the looming threat of future regulation. Therefore, they are forced to continue diverting limited resources to challenge the rules while at the same time planning how to come into compliance if their challenges are ultimately unsuccessful.

To justify this outcome, the item uses the Paperwork Reduction Act (PRA) process as an excuse for delaying a final decision on the small business exemption. It asserts that the PRA process will help the FCC estimate the burden of complying with the new requirements. That type of approach – where an agency adopts rules and “right-sizes” them afterwards – is completely backwards. An agency is supposed to seek comment on proposed rules and the associated costs and benefits *during* the rulemaking proceeding so that the final rules and the estimated burdens submitted to the Office of Management and Budget (OMB) for review reflect a reasoned cost-benefit analysis. Addressing the impact of rules after the fact effectively sets up a second proceeding before OMB to challenge burden estimates that the FCC concedes have not been substantiated. That is not how the process is designed to work, and creates further uncertainty as the Commission may have to modify its rules if its baseless burden estimates turn out to be inaccurate. Moreover, this admission that the FCC has not yet fully assessed the impact of the rules on small business is inconsistent with the FCC’s representations under the Regulatory Flexibility Act that it completed the required economic analysis. We welcome your viewpoints on this as well.

We appreciate the attention you have given to this proceeding and we would be pleased to assist you and your Committees in any way.

Sincerely,



Michael O’Rielly  
Commissioner  
Federal Communications Commission



Aji Pai  
Commissioner  
Federal Communications Commission

cc: The Honorable Steve Scalise  
The Honorable Steve King  
The Honorable Marsha Blackburn  
The Honorable Leonard Lance  
The Honorable Renee Ellmers

The Honorable Joe Pitts  
The Honorable Bill Johnson  
The Honorable Pete Olson  
The Honorable Mike Bost  
The Honorable John Shimkus  
The Honorable Gus Bilirakis  
The Honorable Brett Guthrie  
The Honorable Markwayne Mullin  
The Honorable Michael Burgess  
The Honorable Richard Hudson  
The Honorable Trent Kelly  
The Honorable Joe Barton  
The Honorable David Brat  
The Honorable Tim Huelskamp  
The Honorable Carlos Curbelo  
The Honorable Mike Pompeo  
The Honorable Adam Kinzinger  
The Honorable Chris Collins  
The Honorable Blaine Luetkemeyer  
The Honorable Cresent Hardy  
The Honorable Billy Long  
The Honorable Steve Knight  
The Honorable Richard Hanna  
The Honorable Kevin Cramer  
The Honorable Christopher Gibson  
The Honorable Aumua Amata

## YOUR WIRELESS LIFE (../../YOUR- WIRELESS-LIFE)

### Blocking Robocalls

While some recorded messages like flight delays or school closings are welcomed, others are not. Robocalls, or unsolicited prerecorded calls and SPAM text messages from businesses or organizations, aren't only annoying, but illegal under federal law if sent to your mobile device without your consent.

Some calls may ask you to press a number to be removed. Legitimate companies will adhere to your request; however, some dishonest organizations will add you to even more calls.

That's why wireless carriers need your help to stop these bad actors by reporting these unwanted calls and text messages to the proper authorities. If you receive an automated call or text that you did not sign up for to your cellphone, write down the number that appears on your caller ID.

SPAM text messages that are sent from a phone number (not those sent from an email address), should be forwarded to 7726 (or SPAM). This free text exchange with the carrier will report the SPAM number and you will receive a response from the carrier thanking you for reporting the SPAM.

For robocalls as well as texts, file a complaint with the FTC or FCC via their websites – [ftc.gov \(https://www.ftc.gov/\)](https://www.ftc.gov/) or [fcc.gov \(http://www.fcc.gov/\)](http://www.fcc.gov/), or by calling the FCC at 1-888-CALL-FCC or the FTC at 1-888-382-1222.

You may also proactively add your wireless devices and/or landline numbers to the National Do Not Call Registry, which would prohibit telemarketers to call your registered numbers at Do Not Call Dot Gov.

CTIA assembled a list of apps for the [Android \(/your-wireless-life/consumer-tips/blocking-robocalls/android-robocall-blocking\)](#), [BlackBerry \(/your-wireless-life/consumer-tips/blocking-robocalls/blackberry-robocall-blocking\)](#), [iOS \(/your-wireless-life/consumer-tips/blocking-robocalls/ios-robocall-blocking\)](#) and [Windows \(/your-wireless-life/consumer-tips/blocking-robocalls/windows-](#)

[robocall-blocking](#)) operating systems to block unwanted calls as well as step-by-step instructions on how to block individual numbers based on these operating systems.

## Apps to Block Unwanted Calls

- [Android \(/your-wireless-life/consumer-tips/blocking-robocalls/android-robocall-blocking\)](#)
- [BlackBerry \(/your-wireless-life/consumer-tips/blocking-robocalls/blackberry-robocall-blocking\)](#)
- [iOS \(/your-wireless-life/consumer-tips/blocking-robocalls/ios-robocall-blocking\)](#)
- [Windows \(/your-wireless-life/consumer-tips/blocking-robocalls/windows-robocall-blocking\)](#)

## Related Videos

 [Robocall Blocking for Android Devices](#)



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Robocall Blocking for BlackBerry Devices (Passport & Classic) (#)

Robocall Blocking for iOS Devices (#)

Robocall Blocking for Windows Devices (#)

*Last Updated: October 2015*

FRED UPTON, MICHIGAN  
CHAIRMAN

FRANK PALLONE, JR., NEW JERSEY  
RANKING MEMBER

ONE HUNDRED FOURTEENTH CONGRESS  
**Congress of the United States**  
**House of Representatives**  
COMMITTEE ON ENERGY AND COMMERCE  
2125 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6115  
Majority (202) 225-2927  
Minority (202) 225-3641

January 29, 2016

Ms. Elizabeth Bowles  
President and Chair of the Board, Aristotle, Inc.  
Legislative Chair, Wireless Internet Service Providers Association  
4417 13th Street  
Saint Cloud, FL 34769

Dear Ms. Bowles:

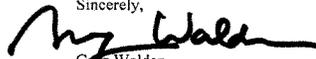
Thank you for appearing before the Subcommittee on Communications and Technology on Tuesday, January 12, 2016, to testify at the hearing entitled "Legislative Hearing on Four Communications Bills."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions with a transmittal letter by the close of business on Friday, February 12, 2016. Your responses should be mailed to Greg Watson, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, DC 20515 and e-mailed in Word format to [Greg.Watson@mail.house.gov](mailto:Greg.Watson@mail.house.gov).

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

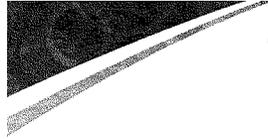
Sincerely,



Greg Walden  
Chairman  
Subcommittee on Communications and Technology

cc: Anna G. Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment



4417 13<sup>th</sup> Street #317  
St Cloud, FL 34769  
Phone: 866-317-2851  
[www.wispa.org](http://www.wispa.org)

February 12, 2016

The Honorable Greg Walden, Chairman  
Subcommittee on Communications and Technology  
Committee on Energy and Commerce  
2125 Rayburn House Office Building  
Washington, D.C. 20515-6115

The Honorable Anna G. Eshoo, Ranking Member  
Subcommittee on Communications and Technology  
241 Cannon House Office Building  
Washington, DC 20515

Dear Chairman Walden and Ranking Member Eshoo:

On behalf of the Wireless Internet Service Providers Association (WISPA), attached is our response to the questions posed in your January 29, 2016 for inclusion in the record.

Thank you for the opportunity to testify at the January 12, 2016 hearing. I appreciate the opportunity to work with you and your staffs.

Please contact me if you have any questions.

Sincerely,

*/s/ Elizabeth Bowles*  
Elizabeth Bowles  
Legislative Committee Chair

Enclosure



**1. Under the FCC's enhanced transparency requirements, consumers are entitled to receive information on promotional rates, all fees and/or surcharges, as well as all data caps and allowances. Can you identify what costs would be associated with providing consumers with this specific information?**

WISPA has identified a number of costs that would be associated with providing this specific information, and we recently polled our members to obtain their estimates. The largest Member to complete the survey has 4,000 customers, and the smallest member to complete the survey has one customer. The responses below are based on the results of the survey.

First, with respect to completing the Safe Harbor Fixed Broadband Consumer Disclosure Form the first time, our responding members estimated that it would require the following:

1. Outside engineer
2. Technical writer
3. Administrator
4. Web administrator
5. Outside Counsel and/or Consultant

According to our members, the recurring annual costs for filling out the form using all or some of these range from a low of \$2,500 (where most work is done by internal staff) to a high of \$20,600 (when outside assistance needs to be retained).

Second, with respect to the costs for ongoing compliance to complete the Consumer Disclosure Form to reflect changes in equipment, pricing, and service offerings, the survey respondents estimated a range of \$1,000/year to \$36,000/year depending on the size of the WISP and the need for outside counsel.

Third, compliance with the enhanced disclosure requirement concerning the "actual average performance of service during peak usage" will require our Members to purchase additional equipment at an average cost of \$50,000, depending on the number of customers.

Fourth, to the extent WISPA's Members would be required to measure packet loss, they would need to purchase equipment at an average cost of \$70,000, depending on the number of customers.

Finally, with respect to ongoing compliance costs following the initial completion of the Safe Harbor Form and the purchase of additional equipment, our Members estimate these costs to be approximately \$40,000 annually.

Some of our members were unable to answer the question about the costs of compliance because they lack sufficient knowledge of the scope and complexity of the requirements. For example, one member responded as follows:

I have no idea how much this would cost, but I'm already having trouble filing the 477 (they keep coming back for more information and a revised filing, so I have to do it over and over again). . . . I think the error might be coming from the filing information that came from them, but again as a small WISP with no one to handle this aspect I don't have time to research the issue and fix it.

**2. What is the average size of a WISPA member?**

Approximately 1,400.

**3. How many customers does your largest Member company serve?**

WISPA's largest Member company serves approximately 200,000 customers. This is the only WISPA Member with more than 100,000 customers. WISPA has two Members that serve more than 10,000 customers. The remaining Members serve less than 10,000 customers.

**4. How many customers does your smallest Member company serve?**

WISPA's smallest member company has one customer. WISPA has 144 Members with fewer than 100 customers.

